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No. 12754

1668

United States  
Court of Appeals  
for the Ninth Circuit.

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LEON TOMCZAK and HELEN TOMCZAK,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Appeal from the District Court of the United States  
Northern District of California,  
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

CHARLES A. CHRISTIN,

550 Russ Building,  
San Francisco, California,

Attorney for Defendants and Appellants.

SIDNEY FEINBERG,

WILLIAM B. SPOHN,

Office of the Housing Expediter,  
821 Market Street,  
San Francisco, California,

Attorneys for Plaintiff and Appellee.





United States District Court for the Northern  
District of California, Southern Division  
No. 29257G

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

LEON TOMCZAK and HELEN TOMCZAK,  
Defendants.

COMPLAINT FOR INJUNCTION,  
RESTITUTION AND TREBLE DAMAGES

Count I.

1. In the judgment of the Housing Expediter, the defendants have engaged in acts and practices which constitute violations of Section 206(a) of the Housing and Rent Act of 1947, as amended (50 U.S.C.A. App. 1881, 1906; Public Law 31, 81st Congress, 1st Session).

2. Jurisdiction of this action is conferred upon this Court by Sections 206(b) and 206(c) of said Housing and Rent Act of 1947, as amended.

3. At all times mentioned herein defendants were the landlords of and rented certain controlled housing accommodations located within the San Francisco Bay Defense-Rental Area, and described as 1433 Clay Street, City and County of San Francisco, California.

4. Since July 1, 1947, there has been in full force and effect pursuant to said Housing and Rent

Act of 1947, as amended, the Rent Regulations issued pursuant to said Act, establishing a maximum rental for the use and occupancy of housing and rental accommodations within the defense-rental area in which the premises referred to in Paragraph 3 of Count I above are located.

5. Since July 1, 1947, defendant demanded and received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Items 1(a) and 1(b) of Schedule marked Exhibit "A" attached hereto and by reference made a part hereof.

6. Since July 1, 1947, defendants demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

## Count II.

1. Plaintiff incorporates herein by reference the allegations in Paragraphs 3 and 4 of Count I of his Complaint herein.

2. Jurisdiction of this action is conferred upon this Court by Sections 205 and 206(c) of said Housing and Rent Act of 1947, as amended.

3. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action), to wit: between November 1, 1948, and September 1, 1949, defendants demanded and received from tenant occupying the premises described in Paragraph 3 of Count I above, rentals in excess of the lawful rental permitted by said Rent Regulations, as appears more fully in Item 2(a) of Schedule marked Exhibit "A" attached hereto and by reference made a part hereof.

4. Since July 1, 1947, and within one (1) year prior to the date of the commencement of this action (exclusive of the thirty (30) day period immediately prior to the date of the commencement of this action) defendants have demanded, accepted or received as rent for other terms of occupancy or from other tenants or for other premises rentals in excess of the lawful maximum permitted by said Rent Regulations, the terms of which occupancy or the names of which tenants or the premises involved being presently unknown to the Plaintiff.

5. More than thirty (30) days have elapsed since the occurrence of the violations hereinabove alleged, and the persons from whom such excess rental payments were demanded, accepted or received have not instituted any action under Section 205 of the Housing and Rent Act of 1947, as amended, for said violations.

Wherefore, the Plaintiff demands and prays:

1. That an injunction be issued enjoining the defendants, their attorneys, agents, servants and employees and all other persons in active concert or participation with the defendants from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any Regulation or Order heretofore or hereafter adopted, pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any acts and practices which constitute or will constitute a violation of any of the provisions of the Housing and Rent Act of 1947, as amended, or extended, or superseded, or of the Rent Regulations issued pursuant thereto.

2. That the defendant be ordered and directed to pay to the Treasurer of the United States, for and on behalf of all persons entitled thereto, a refund of all amounts (the amount presently ascertained by the Plaintiff being the sum of Nine Hundred One and 25/100 Dollars (\$901.25), in excess of the lawful maximum rents which have been or may be demanded, accepted or received by the defendant from any tenants for or in connection with the use or occupancy of the housing accommodations hereinbefore described; or, in the alternative, that the defendant be ordered and directed to pay the amounts in excess of the lawful maximum rents as hereinabove prayed, to the Treasurer of the United States.

3. That judgment for the Plaintiff be granted herein for Eight Hundred Twenty-five Dollars (\$825.00), being three times the amount by which the rents demanded, accepted or received by defendant within one (1) year prior to the date of the commencement of this action (excluding, however, the thirty (30) days immediately prior to the date of the commencement of this action) exceeded the legal maximum rent; provided, however, that in the event this Court requires the defendant to make refunds as prayed for, the amount sought in judgment in this paragraph be the sum of Five Hundred Fifty Dollars (\$550.00).

4. That such other, different or further relief to which Plaintiff may be entitled be granted, or other relief be accorded which the Court may find necessary to effectuate the purposes of the said Act as now existing, or hereafter amended or superseded, and of any orders or regulations issued thereunder.

5. That Plaintiff recover the costs of this action.

Dated this 25th day of October, 1949.

/s/ GEORGE L. BASYE,

Attorney for Plaintiff,

Office of Housing Expediter.

## EXHIBIT A

Leon and Helen Tomczak		Schedule		Maximum		Number of Overcharges	Amt. of Each Overcharge	Overcharge to Each Tenant	Amount Subject to Treble Damages
Item	Tenant	Unit	Date Rented	Rent Collected	Legal Rent				
1(a)	Albert W. Niggemeyer and Norma J. Niggemeyer	Apt. 14 1433 Clay St. San Francisco, Calif.	11-13-47 9- 1-49	\$75.00 per mo.	\$47.50 per mo.	21½	\$27.50	\$591.25	
1(b)	Albert W. Niggemeyer and Norma J. Niggemeyer	Apt. 14 1433 Clay St. San Francisco, Calif.	11-13-47	\$310.00—For decorating apartment, as condition precedent to obtaining premises				\$310.00	
2(a)	Albert W. Niggemeyer and Norma J. Niggemeyer	Apt. 14 1433 Clay St. San Francisco, Calif.	11- 1-48 9- 1-49	\$75.00 per mo.	\$47.50 per mo.	10	\$27.50		\$275.00

[Endorsed]: Filed November 1, 1949.



[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS

To: Leon and Helen Tomczak, 1433 Clay Street,  
Apt. #1, San Francisco, California.

For the purpose of this action only, pursuant to the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, and within 10 days after service of this Request, Plaintiff requests the Defendants to admit the genuineness of the documents described and exhibited herewith, if any, and to admit the truth of the following relevant matters of fact.

1. That at all times material to this action Defendants were the landlords of certain controlled housing accommodations, more particularly described and set forth in Exhibit A attached to Plaintiff's Complaint, which schedule is by reference incorporated herein.

2. That the items in said schedule truthfully and correctly designate the names of the tenants who occupied the designated housing accommodations.

3. That the items in said schedule truthfully and correctly designate the periods said tenants occupied said accommodations.

4. That the items in said Exhibit A truthfully and correctly designate the rentals collected from said tenants.

5. That the items in said Exhibit A truthfully and correctly designate the amounts demanded and

received for other fees or services from said tenants.

6. That said schedule truthfully and correctly designates the registered legal rents in force for the indicated housing accommodations for the periods of time referred to in request No. 3.

Dated this 9th day of December, 1949.

/s/ REUEL K. YOUNT,  
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 12, 1949.

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[Title of District Court and Cause.]

### ANSWER

Come now the defendants Leon Tomczak and Helen Tomczak and answering the complaint on file herein, admit, deny and allege as follows:

#### I.

Making answer to Paragraphs 5 and 6 of Count I of said complaint, these defendants deny generally and specifically, each and every, all and singular the allegations therein contained.

#### II.

Making answer to Paragraphs 3, 4 and 5 of Count II of said complaint these defendants deny generally and specifically each, and every, all and singular, the allegations therein contained.

Wherefore, defendants pray that plaintiff taking

nothing by its complaint and that they be hence dismissed.

CHRISTIN, KEEGAN &  
CARROLL,

By /s/ CHARLES A. CHRISTIN,  
Attorneys for Defendants.

[Endorsed]: Filed December 15, 1949.

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[Title of District Court and Cause.]

DEFENDANTS' REPLY TO PLAINTIFF'S  
REQUEST FOR ADMISSIONS

Come now the defendants above named and make this their reply to plaintiff's request for admissions.

I.

Defendants admit requests for admissions Nos. 1, 2, 3, 4 and 5.

II.

Defendants deny Request for Admission No. 6 and in this respect allege that the premises described in the schedule attached to plaintiff's complaint on file were decontrolled by reason of the filing of Form D96 with the Office of the Housing Expediter in and for the San Francisco Bay-Defense Rental Area, which referred to the termination of a lease originally filed with the said Housing Expediter, and designated as No. 01528.

That the defendants herein filed a Petition for Adjustment of Rent with the Office of Housing

Expediter on September 30, 1949, and that on December 30, 1949, by an order in writing in proceedings No. HL-18450 the rent for said premises was fixed at the sum of \$54.62 per month.

CHRISTIN, KEEGAN &  
CARROLL,

By /s/ CHARLES A. CHRISTIN,  
Attorneys for Defendants.

State of California,  
City and County of San Francisco—ss.

Helen Tomczak, being first duly sworn, deposes and says:

That she is one of the defendants named in the above-entitled action; that she has read the foregoing Reply to Plaintiff's Request for Admissions and knows the contents thereof; that the same is true of her own knowledge except as to matters therein stated upon information and belief and as to those matters she believes it to be true.

/s/ HELEN TOMCZAK.

Subscribed and sworn to before me this 24th day of January, 1950.

[Seal]           /s/ LOUIS WIEHER,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed January 24, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION TO FILE  
AMENDMENT TO ANSWER

To the Plaintiff, United States of America, and to  
Messrs. Sidney Feinberg and William B.  
Spohn, Its Attorneys:

You, and Each of You, Will Please Take Notice  
that on Thursday, May 11, 1950, at the hour of ten  
o'clock a.m., the undersigned will move to file  
amendment to answer, a copy of which is hereto  
attached and made a part hereof.

Said motion will be made on the ground that it  
constitutes a proper defense in said proceedings  
and was not filed prior hereto by reason of the  
fact that there was a doubt as to whether or not  
the law applicable to the admission of evidence to  
sustain the allegations in said amendment to said  
answer, as the decisions of the Appellate Courts  
now indicate.

Dated: May 10, 1950.

CHRISTIN, KEEGAN &  
CARROLL,  
CHARLES A. CHRISTIN,

By /s/ CHARLES A. CHRISTIN,  
Attorneys for Defendants.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Leave of court first had and obtained, defendants file this their amendment to their Answer on file herein, and allege as follows:

I.

That should it develop that the said defendants demanded and received rentals higher than the maximum rents permitted by said rent regulations for the use and occupancy of the premises at Apartment 14, 1433 Clay Street, in the City and County of San Francisco, they did said acts in good faith and without any intention of violating such regulations and without knowledge that the said rents were higher than the said maximum rents, and the said alleged violations were neither wilful nor the result of said defendants' failure to take practical precautions against the occurrence of the said violation.

CHRISTIN, KEEGAN &  
CARROLL,

By /s/ CHARLES A. CHRISTIN,  
Attorneys for Above-Named  
Defendants.

State of California,  
City and County of San Francisco—ss.

Helen Tomczak, being first duly sworn, deposes and says:

That she is one of the defendants named in the above-entitled action; that she has read the fore-



going Amendment to Answer and knows the contents thereof; that the same is true of her own knowledge except as to matters therein stated upon information and belief and as to those matters she believes it to be true.

/s/ HELEN TOMCZAK.

Subscribed and sworn to before me this 20th day of April, 1950.

[Seal] /s/ JEAN M. WINTERMANN,  
Notary Public in and for the City and County of  
San Francisco, State of California.

My Commission Expires January 4, 1951.

Receipt of copy acknowledged.

[Endorsed]: Filed May 11, 1950.

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[Title of District Court and Cause.]

### ORDER FOR JUDGMENT

Plaintiff's motion for judgment on the pleadings is denied. Defendants' motion to file amendment to answer is granted.

On the merits, judgment will go for the plaintiff for the sum of \$901.25 restitution; \$412.50 damages and costs.

Submit findings pursuant to the Rules.

Dated: May 12, 1950.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed May 12, 1950.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause was commenced on November 1, 1949, the Plaintiff seeking an injunction and restitution under Section 206(b) and treble damages under Section 205 of the Housing and Rent Act of 1947, as amended (50 U.S.C. App. 1881, et seq.). Personal service of the complaint and summons as required by the Federal Rules of Civil Procedure was made by a Deputy United States Marshal on November 8, 1949.

Thereafter, following Defendant's answers to the complaint and request for admissions by the Plaintiff, the cause came regularly on for trial on May 11, 1950, before this Court, the Honorable Louis E. Goodman, Judge presiding, and the Plaintiff appearing by its counsel, William B. Spohn, and the Defendants in person and by their counsel, Charles A. Christin. At the conclusion of trial, evidence both oral and documentary having been introduced by and on behalf of the respective parties and after oral argument by counsel, the Court being fully advised in the premises made its order for judgment, pursuant to which are the following:

### Findings of Fact

1. That the housing accommodations described in the Plaintiff's complaint are located within the San Francisco Bay Defense-Rental Area.

2. That at all times material to this action, the maximum legal rent prescribed under the aforesaid Act and the Regulations issued pursuant thereto for said housing accommodations was \$47.50 per month, as specified in the complaint herein.

3. That the Defendants, beginning on or about November 13, 1947, and continuing to or about September 1, 1949, in violation of the aforesaid Act and Regulations, did demand, accept and receive from the tenants, Albert W. Niggemeyer and Norma J. Niggemeyer, payments of rent in excess of said maximum legal rent in the amount of \$591.25.

4. That the Defendants, on or about November 13, 1947, in further violation of the aforesaid Act and Regulations, did require as a condition of rental that said tenants have the housing accommodations repainted and redecorated at their own expense, which the tenants did at a cost of \$310.

5. That such excess rents were demanded, accepted and received, and such painting and decorating costs were required by the Defendants on the assumption that the housing accommodations had been removed from control by virtue of an expired lease between the Defendants and a previous tenant, which lease had purportedly been executed pursuant to the provisions of Section 204(b) of the aforesaid Housing and Rent Act and the pertinent Regulations.

6. That said lease was submitted by the Defendants to the San Francisco Bay Defense-Rental

Area Office on or about July 15, 1947, but upon examination was rejected by the Area Rent Director as not conforming with the requirements of the aforesaid Act and Regulations in that neither the lease nor the accompanying registration form contained or showed a date of execution, and were accordingly returned to the Defendants as not acceptable, together with a notice of such action specifying the reason therefor.

7. That said lease was again submitted by the Defendants to the San Francisco Bay Defense-Rental Area Office on or about July 21, 1947, and upon re-examination was again rejected by the Area Rent Director as not conforming with the requirements of the aforesaid Act and Regulations in that the lease contained certain improper provisions, and was again returned to the Defendants as not acceptable, together with a notice of such action specifying the reason therefor.

8. That the Area Rent Director's determination that said lease did not conform with the requirements of the aforesaid Act and Regulations is supported by substantial evidence showing that the lease contained provisions for a substantial increase in rent as well as a substantial decrease or reduction in services to be provided the tenants by the Defendant as landlord.

9. That on or about May 26, 1948, the Defendants filed with the San Francisco Bay Defense-Rental Area Office a report of termination of said lease, following which the Area Rent Director by

letter dated June 28, 1948, informed the Defendants that the lease had previously been rejected as defective and that in the opinion of the Area Rent Director the housing accommodations in question were not subject to decontrol.

10. That following the aforesaid rejections of the lease by the Area Rent Director the Defendants have wholly failed, neglected or refused to file with the San Francisco Bay Defense-Rental Area Office either new, modified or corrected leases but have entirely disregarded the applicable provisions of the aforesaid Act and Regulations in the rental and operation of the housing accommodations in question.

11. That following the aforesaid rejection of the lease by the Area Rent Director, the Defendants took no steps nor instituted any proceedings either to appeal from the action of the Area Rent Director or to have such action reviewed as provided in the Rent Procedural Regulations issued pursuant to the Housing and Rent Act.

### Conclusions of Law

1. That the Court has jurisdiction of the subject matter of this action and of the parties under Section 206(b) of the aforesaid Housing and Rent Act.

2. That the aforesaid housing accommodations were at all times material to this action controlled under the aforesaid Act and Regulations.



3. That the lease purportedly entered into between the Defendants and the previous tenant, as specified in the foregoing Findings of Fact, was neither valid nor effective to increase the legal maximum rent for the housing accommodations in question nor to remove said accommodations from control upon the expiration or termination of said lease.

4. That the Defendants by demanding, accepting and receiving the excess payments of rent and requiring the repainting and redecorating of the accommodations, as specified in the foregoing Findings of Fact, did wilfully violate the aforesaid Act and Regulations.

5. That the Defendants have both failed to pursue and exhaust the prescribed administrative remedies for appeal from or review of the actions of the Area Rent Director specified in the foregoing Findings of Fact.

6. That the Plaintiff, on account of said wilful violations, is entitled to an injunction against any further violations by the Defendants under the aforesaid Act and Regulations, as prayed for in its complaint.

7. That the Plaintiff, on account of said wilful violations, is entitled to a judgment and decree requiring and directing the Defendants to forthwith refund to the Plaintiff on behalf of the aforesaid tenants the excess amounts wilfully demanded, accepted and received by the Defendants for rental

of the specified housing accommodations together with the amount required by the Defendants to be expended by the said tenants for the repainting and redecorating of said accommodations in the total sum of Nine Hundred One and 25/100 Dollars (\$901.25).

8. That the Plaintiff, on account of the afore-said wilfull violations, is entitled to treble damages for all such violations occurring since April 1, 1949, the effective date of the 1949 amendment of the Housing and Rent Act, in the amount of Four Hundred Twelve and 50/100 Dollars (\$412.50).

9. That the Plaintiff is further entitled to its costs in this action.

Let judgment be entered in accordance herewith.

Dated this 8th day of June, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

Lodged June 2, 1950.

[Endorsed]: Filed June 8, 1950.

United States District Court for the Northern  
District of California, Southern Division  
No. 29257

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.

LEON TOMCZAK and HELEN TOMCZAK,  
Defendants.

JUDGMENT AND DECREE

An Order for Judgment, Findings of Fact, and Conclusions of Law having been filed in the above-entitled cause,

Wherefore, by reason of the law, the evidence, and the premises contained in said Order, Findings, and Conclusions,

It Is Hereby Ordered, Adjudged, and Decreed that the Defendants, Leon Tomczak and Helen Tomczak, their attorneys, agents, servants, employees and all other persons in active concert or participation with the Defendants, be and they hereby are permanently enjoined and restrained from directly or indirectly demanding, accepting or receiving rents in excess of the maximum rents established by any regulation or order heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded, or from engaging in any other acts or practices which constitute or will constitute a violation of the said Housing and Rent Act or of any regulation or order adopted pursuant thereto.



It Is Further Ordered, Adjudged, and Decreed that the Defendants be and they hereby are required and directed to forthwith make restitution to the Plaintiff on behalf of the tenants, Albert W. Niggemeyer and Norma J. Niggemeyer, overcharged by the Defendants for rental and required to repaint and redecorate the housing accommodations specified in this cause, in the total amount of Nine Hundred One and 25/100 Dollars (\$901.25).

It Is Further Ordered, Adjudged, and Decreed that the Plaintiff do have and recover of and from the Defendants the sum of Four Hundred Twelve and 50/100 Dollars (\$412.50) to be paid forthwith as treble damages for the wilfull violations of the aforesaid Housing and Rent Act and Regulations occurring since April 1, 1949.

It Is Further Ordered, Adjudged, and Decreed that the Defendants be and they are hereby required and directed to forthwith pay the Plaintiff's costs herein (to be taxed by the Clerk) in the amount of . . . . ., all said payments to be made by the Defendant to the Treasurer of the United States at the Litigation Section of the Office of the Housing Expediter, Room 712, 821 Market Street, San Francisco, California.

Dated this 8th day of June, 1950.

/s/ LOUIS E. GOODMAN,

United States District Judge.

Lodged June 2, 1950.

[Endorsed]: Filed June 8, 1950.

[Title of District Court and Cause.]

To: Mr. Sidney Feinberg, Attorney, 821 Market Street, Room 720, San Francisco, Calif.

Messrs. Christin, Keegan & Carroll, Attorneys, Russ Building, San Francisco, Calif.

### NOTICE OF ENTRY OF JUDGMENT

You Are Hereby Notified that on June 9, 1950, a Decree and Judgment was entered of record in this office in the above-entitled case.

C. W. CALBREATH,  
Clerk, U. S. District Court.

San Francisco, California, June 9, 1950.

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[Title of District Court and Cause.]

### PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

The defendants above named file the following Proposed Amendments to Findings of Fact and Conclusions of Law:

On Page 3 of the Proposed Findings of Fact after line 17, add Paragraph 9 (a) reading as follows:

That on the 30th day of September, 1949, the defendants filed on Form D-114, supplied by the Housing Expediter and designated "Landlord's Petition for Adjustment in Rent Due to Minor Defect

in a Statutory Lease” and there was included in said document:

“The notice states ‘Improper Provisions’ and checked deposit on keys and deposit against the closing bill.

“No deposit has been taken at any time from any of the tenants for the keys or closing bill.”

Thereafter the Housing Expediter by written order corrected said lease and so specified in his order of December 30, 1949.

That the correction as made by the Housing Expediter eliminates any objection which the Housing Expediter had at the time that he returned and rejected the said lease.

Respectfully submitted:

CHARLES A. CHRISTIN,  
CHRISTIN, KEEGAN &  
CARROLL,

By /s/ CHARLES A. CHRISTIN,  
Attorneys for Defendants.

Affidavit of service by mail attached.

[Endorsed]: Filed June 9, 1950.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL AND TO  
VACATE JUDGMENT

To the Plaintiff Above Named and to Messrs. Sidney Feinberg and William B. Spohn, Its Attorneys:

You, and Each of You, Will Please Take Notice that the defendants Leon Tomczak and Helen Tomczak, intend to and will move the above-entitled Court, to vacate and set aside the judgment made and filed on June 9, 1950, and entered on said date, and to grant a new trial in the premises.

Said motion will be based upon this notice, upon all the papers, files, pleadings and proceedings herein, upon the minutes of the Court, and will be made upon each of the following grounds:

1. Irregularity in the proceedings of the Court by which defendants were prevented from having a fair trial.

2. Accident and surprise, which ordinary prudence could not have guarded against.

3. Insufficiency of the evidence to justify the decision entered thereon, and that said decision is against law.

4. Errors in law occurring at the trial and excepted to by defendants.

5. That said Court was without jurisdiction to make and enter said judgment.

6. Newly discovered evidence material for the

parties making this motion for a new trial, which evidence could not with reasonable diligence have been discovered and produced at the trial.

Dated: June 19, 1950.

/s/ CHARLES A. CHRISTIN,

Attorney for Defendants.

[Endorsed]: Filed June 19, 1950.

---

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL  
AND TO VACATE JUDGMENT

To the Plaintiff Above Named and to Messrs. Sidney Feinberg & William B. Spohn, Its Attorneys:

You, and Each of You Will Please Take Notice that the defendants Leon Tomczak and Helen Tomczak intend to and will move the above-entitled Court on the 3rd day of July, 1950, at the hour of ten o'clock a.m., or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled Court Room 258, located at the Post Office Building, State of California, to vacate and set aside the judgment made and filed in the above-entitled matter, and to grant a new trial in the premises.

Dated: June 19, 1950.

/s/ CHARLES A. CHRISTIN,

Attorney for Defendants.

[Endorsed]: Filed June 19, 1950.

[Title of District Court and Cause.]

### ORDER DENYING MOTIONS

Defendants' motions to vacate judgment and for a new trial are hereby denied.

Dated: July 26, 1950.

/s/ LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed July 27, 1950.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Circuit Court of Appeals:

Notice Is Hereby Given that Leon Tomczak and Helen Tomczak, the defendants in the above proceedings, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered on June 8, 1950, and a motion for new trial denied by the District Court on July 26, 1950.

Dated: September 22, 1950.

/s/ CHARLES A. CHRISTIN,  
Attorney for Defendants and  
Appellants.

[Endorsed]: Filed September 25, 1950.



[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint for Injunction, Restitution and Treble Damages.

Plaintiff's Request for Admissions.

Answer.

Defendants' Reply to Plaintiff's Request for Admissions.

Notice of Motion to File Amendment to Answer and Amendment to Answer.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment and Decree.

Notice of Entry of Judgment.

Proposed Amendments to Findings of Fact and Conclusions of Law.

Motion for a New Trial and to Vacate Judgment.

Notice of Motion for a New Trial and to Vacate Judgment.

Order Denying Motions to Vacate Judgment and for a New Trial.

Notice of Appeal.

Order Extending Time to File Cost Bond and Designation of Authorities.

Designation of Record on Appeal of Appellants, Leon Tomczak and Helen Tomczak.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

Defendants' Exhibit No. A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 17th day of November, A.D. 1950.

C. W. CALBREATH,  
Clerk.

[Seal] By /s/ M. E. VAN BUREN,  
Deputy Clerk.



[Endorsed]: No. 12,754. United States Court of Appeals for the Ninth Circuit. Leon Tomczak and Helen Tomczak, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division. Filed November 27, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit  
Docket No. 12,754

UNITED STATES OF AMERICA,  
Plaintiff and Respondent,

vs.

LEON TOMCZAK and HELEN TOMCZAK,  
Defendants and Appellants.

STATEMENT OF POINTS ON WHICH  
APPELLANTS INTEND TO RELY

To the Plaintiff, United States of America, and  
Messrs. Sidney Feinberg and William B.  
Spohn, Its Attorneys:

Please Take Notice that Leon Tomczak and Helen Tomczak, appellants in the above-entitled cause, intend to rely on the following points on appeal:

That the District Court of the United States erred:

1. In holding and deciding that the "15 per cent lease" filed by the appellants with the Office of the Housing Expediter did not conform with the requirements of Section 204-B of the Housing and Rent Act of 1947.

2. In ordering, adjudging and decreeing that appellants make restitution to the plaintiff on behalf of the tenants in the amount of \$901.25.

3. In rendering an opinion and decision which in the respects above enumerated are contrary to law and the regulations and are not supported by the evidence in case.

4. In refusing to grant appellants' motion for a new trial.

Dated: November 29, 1950.

/s/ CHARLES A. CHRISTIN,  
Attorney for Appellants.

[Endorsed]: Filed November 30, 1950.

No. 12755

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United States  
Court of Appeals  
for the Ninth Circuit.

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FIREMAN'S FUND INSURANCE CO., a Corporation,

Appellant,

vs.

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased, and  
UNITED STATES OF AMERICA,

Appellees.

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased,

Appellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, UNITED STATES OF AMERICA,

Appellees.

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Apostles on Appeal

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Appeals from the United States District Court,  
Western District of Washington,  
Northern Division

PAUL P. O'BRIEN,

CLERK



No. 12755

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United States  
Court of Appeals  
for the Ninth Circuit.

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FIREMAN'S FUND INSURANCE CO., a Corporation,

Appellant,

vs.

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased, and  
UNITED STATES OF AMERICA,

Appellees.

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased,

Appellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, UNITED STATES OF AMERICA,

Appellees.

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Apostles on Appeal

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Appeals from the United States District Court,  
Western District of Washington,  
Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF PROCTORS

MR. EDWARD S. FRANKLIN of

MESSRS. BOGLE, BOGLE & GATES,

Proctors for Appellant, and Cross-Appellee  
Fireman's Fund Ins. Co.,  
603 Central Building,  
Seattle 4, Washington.

MR. JAMES G. MULROY,

Proctor for Appellee and Cross-Appellant  
James G. Mulroy as Administrator of the  
Estate of Oscar Carl Johnson, Deceased,  
1410 Hoge Building,  
Seattle 4, Washington.

MESSRS. J. CHARLES DENNIS and

VAUGHN E. EVANS,

Proctors for Appellee and Cross-Appellee  
United States of America,  
1017 U. S. Court House,  
Seattle 4, Washington.



In the District Court of the United States for the  
Western District, Northern Division  
In Admiralty No. 14918

JAMES G. MULROY, as administrator of the  
estate of Oscar Carl Johnson, deceased,  
Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-  
fornia corporation, and UNITED STATES  
OF AMERICA,

Respondents.

### AMENDED LIBEL IN PERSONAM

Comes now the libellant above named and for  
cause of action against the respondents alleges:

#### I.

That the libellant is a resident of the City of  
Seattle, Washington in the Western District of  
Washington, Northern Division and as hereinafter  
set forth is now the duly appointed, qualified and  
acting administrator of the estate of Oscar Carl  
Johnson, deceased.

#### II.

That the said Oscar Carl Johnson was a widower  
and a resident of Seattle, King County, Washing-  
ton when he died intestate on or about August 8,  
1943, leaving as his only heir at law his only child,  
a daughter who is now living, one Betty Jane John-  
son Grant; that on or about May 14, 1945, the libel-

lant herein was appointed by the Superior Court of King County, Washington as administrator of the estate of the said decedent, Oscar Carl Johnson, and at all times thereafter has been and is now the duly appointed and qualified administrator of the said estate, and that this action is brought by him in the interest, behalf and for the exclusive benefit of the decedent's said daughter and only child.

### III.

That now and at all times hereinafter mentioned the respondent, Fireman's Fund Insurance Co., is a corporation organized and existing under and by virtue of the laws of the State of California, authorized to do business and doing business in the Western District of Washington, Northern Division.

### IV.

That Oscar Carl Johnson signed on with the rating of boatswain and as a member of the crew of the S.S. "Capillo," a merchant vessel of the United States of America, operated by the American Mail Line, a corporation, on a voyage commencing at the Columbia River, Oregon, on or about the 15th day of October, 1941, for a voyage to Asiatic waters, under written articles of employment, which provided, among other things, that said vessel would carry a policy of war risk insurance in the face amount of \$5,000.00 on the life of each member of the crew who might lose his life by reason of any act of war, arrests, restraints, internment or warlike operations; that in accordance with said agreement

respondent Fireman's Fund Insurance Co. issued its policy No. 6622 to the American Mail Line, Ltd. for the benefit of the crew of said vessel, including in said policy Oscar Carl Johnson, on said voyage.

V.

That thereafter the respondent, United States of America, through its agency, the War Shipping Administration, issued a seaman's war risk policy of insurance, commonly referred to as a second seaman's war risk policy, which provides for the payment of the sum of \$5,000.00 for loss of life, detention, and for various other things as the result of risk of war and warlike operations, and said policy included and covered Oscar Carl Johnson in his employment as boatswain on the S.S. "Capillo"; that neither said policy nor any copy thereof is in possession of the libellant, but such instrument or a copy thereof is in possession of the aforesaid War Shipping Administration as an agency of the respondent United States of America.

VI.

That said S.S. "Capillo" proceeded on her voyage and while in Oriental waters was attacked and destroyed by Japanese war operations on or about the 29th day of December, 1941, and thereafter all members of the crew of said vessel, including Oscar Carl Johnson, were interned and imprisoned in the Philippine Islands as acts of war by Japanese military forces.

## VII.

That as a direct and proximate cause of the aforesaid warlike acts of the enemy Japanese, and because of their detention of, treatment and hardship inflicted upon the said Oscar Carl Johnson while he was interned as a prisoner of war in a Japanese prison camp in the Philippine Islands he died there on or about the 8th day of August, 1943.

## VIII.

That respondents and each of them in writing were notified of the detention and subsequent death of the aforesaid Oscar Carl Johnson, and of the circumstances connected therewith, as set forth herein, and written demands upon each of said respondents have been made for the payment by them of the insurance provided by policies referred to in paragraphs IV and V of this amended libel, and at all times each of said respondents has denied and disclaimed any and all liability thereunder.

## IX.

That there is existing some question as to which of the aforesaid policies of insurance are or were payable upon the death of Oscar Carl Johnson, and a judgment should be entered herein against such respondent as may be shown by the evidence at the trial of this action to be liable thereon.

Wherefore, libellant, for and in behalf of the aforesaid Betty Jane Johnson Grant, and for her exclusive benefit, prays that he have and recover judgment against the respondents Fireman's Fund



Insurance Co., a California corporation, or against the United States of America, whichever respondent shall be found liable under its policy of insurance covering as aforesaid Oscar Carl Johnson, deceased, in the sum of \$5,000.00, together with interest thereon from August 8, 1943; and for such other and further relief in the premises as the Court shall consider to be equitable and just.

/s/ JAMES G. MULROY.

United States of America,  
Western District of Washington,  
Northern Division—ss.

James G. Mulroy, being first duly sworn upon oath deposes and says: That he is the proctor of record for the libellant in the above-entitled action; that he has read the foregoing amended libel in personam, knows the contents thereof and believes the same to be true.

/s/ JAMES G. MULROY.

Subscribed and Sworn to before me this 24th day of September, 1946.

[Seal]     /s/ DAVID H. JARVIS,

Notary Public in and for the State of Washington,  
residing at Seattle.

Receipt of Copy acknowledged.

Lodged September 26, 1946.

[Endorsed]: Filed September 29, 1947.

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL IN  
PERSONAM

To the Honorable Judges of the District Court of  
the United States for the Western District of  
Washington:

The respondent, United States of America, for its  
Answer to the Amended Libel in Personam on file  
herein, admits, denies and alleges as follows:

I.

The respondent, United States of America, has  
no knowledge or information sufficient to form a  
belief as to the truth of the allegations of Article  
I of the Amended Libel and therefore denies the  
same.

II.

The respondent, United States of America, has no  
knowledge or information sufficient to form a belief  
as to the truth of the allegations of Article II of the  
Amended Libel and therefore denies the same.

III.

The respondent, United States of America, has no  
knowledge or information sufficient to form a belief  
as to the truth of the allegations of Article III of  
the Amended Libel and therefore denies the same.

IV.

Answering Article IV, respondent, United States  
of America, admits that the deceased, Oscar Carl

Johnson, was a member of the crew of the S.S. Capillo and alleges it does not have sufficient information to form a belief as to the truth of the other allegations of said article and therefore denies the same.

V.

Answering Article V, respondent, United States of America, admits that subsequent to March 24, 1943, its agency, the War Shipping Administration, issued a Seaman's War Risk Policy of insurance, commonly referred to as a Second Seaman's War Risk Policy.

Further answering the allegations of said Article, said respondent denies that the said Second Seaman's War Risk Policy included and covered the deceased, Oscar Carl Johnson.

VI.

Respondent, United States of America, admits the allegations of Article VI.

VII.

Answering Article VII, the respondent, United States of America, alleges it does not have sufficient information to form a belief as to the truth of the allegations in said Article and therefore denies the same.

VIII.

Respondent, United States of America, admits the allegations of Article VIII.

## IX.

Respondent, United States of America, denies the allegations of Article IX.

And by way of Further Answer and Affirmative Defense to said Amended Libel, the respondent, United States of America, alleges as follows:

## First Affirmative Defense

That the libellant herein is not entitled, as Administrator of the Estate of Oscar Carl Johnson, to maintain this action.

## Second Affirmative Defense

That the Amended Libel herein does not state a cause of action and that the Amended Libel affirmatively shows that the voyage of the S.S. Capillo, out of which this action arises, commenced more than 30 days prior to March 24, 1943, and fails to state whether or not the Administrator of the War Shipping Administration has exercised the discretion vested in him by Section 1292, Title 50, U.S.C., of finding that the loss of the deceased seaman is related to the war effort and not otherwise adequately provided for and therefore deemed to be covered by the terms of said policy.

## Third Affirmative Defense

That the action herein is pre-mature.

## Fourth Affirmative Defense

## I.

That the voyage of the S.S. Capillo, out of which this action arises, commenced prior to the effective date of the Second Seaman's Policy of War Risk Insurance.

II.

That the alleged daughter of the deceased seaman, Oscar Carl Johnson, to wit, Betty Jane Johnson Grant, was not and is not now a dependent of the said deceased seaman, Oscar Carl Johnson.

III.

That the Administrator of the War Shipping Administration, pursuant to the provisions of Section 1292, Title 50, U.S.C., has, in the exercise of his discretion, determined that the alleged daughter of said deceased seaman is not entitled to a gratuitous award under the Second Seaman's Policy of War Risk Insurance.

Wherefore, having fully answered the Amended Libel herein, respondent, United States of America, prays that the same be dismissed and that it recover its costs and disbursements herein to be taxed.

/s/ J. CHARLES DENNIS,  
United States Attorney,

/s/ VAUGHN E. EVANS,  
Assistant U. S. Attorney.

State of Washington,  
County of King—ss.

Vaughn E. Evans, being first duly sworn, on oath deposes and says:

That he is one of the proctors for the respondent, United States of America, and makes this verification for and on its behalf as he is authorized so to

do; that he has read the within and foregoing Answer, knows the contents thereof and believes the same to be true.

/s/ VAUGHN E. EVANS.

Subscribed and sworn to before me this 24th day of June, 1949.

[Seal] /s/ J. CHARLES DENNIS,

Notary Public in and for the State of Washington,  
residing at Tacoma.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 27, 1949.

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[Title of District Court and Cause.]

STIPULATION FOR TAKING TESTIMONY  
OF BETTY JANE JOHNSON GRANT,  
UPON WRITTEN INTERROGATORIES

It is hereby stipulated and agreed by and between all parties to the above-entitled action that testimony herein of Betty Jane Johnson Grant, daughter of the above-named decedent, Oscar Carl Johnson, who is now a resident of the State of New Jersey, and who is unable personally to appear and testify at the trial of this cause may be taken upon interrogatories and cross-interrogatories to be forwarded to a Notary Public in the State of New Jersey, duly authorized there to administer oaths, and pro-



pounded to her by said Notary at her place of residence in said State.

Dated at Seattle, Washington, July 19, 1950.

FIREMAN'S FUND  
INSURANCE CO.,

By BOGLE, BOGLE & GATES,  
Its Attorneys.

UNITED STATES OF  
AMERICA,

By .....  
U. S. Attorney, and

/s/ VAUGHN E. EVANS,  
Assistant U. S. Attorney.

/s/ JAMES G. MULROY,  
Libellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 19, 1950.

---

[Title of District Court and Cause.]

INTERROGATORIES TO BE PROPOUNDED  
TO BETTY JANE JOHNSON GRANT, IN  
BEHALF OF LIBELLANT

1. Please state your name, age, place of residence, and if you are gainfully employed, your occupation, and compensation received therefrom.

Betty Jane Johnson Grant, 936 Bay Ave.,



Somers Point, N. J., waitress at Edgewater Restaurant, Longport, N. J., \$15.00 per week.

2. State your relationship to the above-named decedent, Oscar Carl Johnson.

Daughter.

3. What was your mother's name?

Johanna Wilcox Holmes.

4. Was your father also known as Carl Oscar Johnson?

Do not know.

5. Were your parents divorced, if so when and where.

Yes, July 7, 1926, Florence, Wis.

6. What other children did your parents have during the period of their marriage?

None.

7. Are you now married and living with your husband, if so please state his name, occupation and income.

Robert H. Grant, not living with him.

8. When and where were you married to your present husband?

Bunnell, Fla., Jan. 20, 1944.

9. Have you ever been married before?

Yes.

10. Have you any children? If so state their names and ages.

Roberta 6, Robert 4, Rebecca 3 months.

11. Were you at any time dependent for your living upon the decedent Oscar Carl Johnson?

Yes.

12. If you answer the foregoing interrogatory affirmatively, please state the period or periods during which you were so dependent, and define clearly the manner and extent of the support provided for you.

Until Jan. 1942, \$75.00 per mo. He was awarded custody of me in the divorce proceedings, his support stopped when he was taken prisoner.

13. During the period or periods referred to in interrogatory No. 12, were you at any time gainfully employed, and if so how much did you earn?

No.

14. During the periods when your father was at sea, with whom did you reside?

Mrs. W. Davis, Crystal Falls, Mich., a great aunt.

15. Who has provided for your support since August 6, 1943?

Great aunt until January, 1944 and then my husband.

16. Have you ever had technical or business training? If so, state the nature of such training, and when it was completed.

International Business Machine, partially completed in 1943.

State of New Jersey,  
County of Atlantic—ss.

Betty Jane Johnson Grant, being first duly sworn, upon oath, deposes and says that she is the only child of Oscar Carl Johnson, deceased, that the foregoing answers were made by her to interrogatories propounded to her as a witness in Cause No. 14918, in the District Court of the United States for the Western District of Washington, Northern Division, that she has read said answers and the same are true and correct.

/s/ BETTY JANE JOHNSON  
GRANT.

Subscribed and sworn to before me this 26th day of July, 1950.

[Seal] /s/ RICHARD S. THOMPSON,  
Notary Public in and for the State of New Jersey,  
residing at Somers Point.

Certificate of County Clerk that Richard S. Thompson is a Notary and authorized to administer oaths.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 8, 1950.

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[Title of District Court and Cause.]

ANSWER TO LIBELLANT'S AMENDED  
LIBEL

Comes Now respondent Fireman's Fund Insurance Company, a California corporation, and for

answer to the Amended Libel filed herein, admits, denies and alleges as follows:

I.

Answering Paragraph I, respondent admits the same.

II.

Answering Paragraph II, respondent admits the same.

III.

Answering Paragraph III, respondent admits the same.

IV.

Answering Paragraph IV, respondent denies the same.

V.

Answering Paragraph V, respondent admits the same.

VI.

Answering Paragraph VI, respondent admits the same.

VII.

Answering Paragraph VII, respondent denies the same.

VIII.

Answering Paragraph VIII, respondent admits the same.

Wherefore, having fully answered the Amended Libel of libelant, respondent Fireman's Fund Insurance Company prays that it may be dismissed

and recover its costs and disbursements herein to be taxed.

/s/ BOGLE, BOGLE & GATES,  
Proctors for Fireman's Fund Insurance Company,  
a California corporation, respondent.

United States of America,  
Western District of Washington,  
Northern Division—ss.

Edw. S. Franklin, being first duly sworn upon oath deposes and says: That he is one of the proctors of record for the respondent Fireman's Fund Insurance Company, a California corporation, in the above-entitled action; that he is authorized and does make this verification on behalf of said respondent; that he has read the foregoing Answer to Amended Libel, knows the contents thereof, and believes the same to be true.

EDW. S. FRANKLIN.

Subscribed and Sworn to before me this 7th day of August, 1950.

[Seal] /s/ ROBERT V. HOLLAND,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 9, 1950.

In the United States District Court for the Western  
District of Washington, Northern Division  
In Admiralty No. 14918

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, deceased,  
Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-  
fornia corporation, and UNITED STATES OF  
AMERICA,  
Respondents.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter coming regularly on for trial at Seattle, Washington, before the undersigned Judge of the above-entitled Court, upon the 15th day of August, 1950, the libellant, James G. Mulroy, a Proctor in Admiralty, duly authorized to appear and practice in this court, being present and acting in his own behalf; respondents, Fireman's Fund Insurance Co. and United States of America, being represented by their respective proctors, Edward S. Franklin, for Bogle, Bogle and Gates, and Vaughn E. Evans for J. Charles Dennis, United States Attorney; and all parties having presented their evidence upon the pleadings herein, and the Court having heard and considered the same together with argument of counsel thereon; and the Court being fully advised in the premises, now makes the following findings of fact and conclusions of law:



## Findings of Fact

## I.

The libellant is a resident of the City of Seattle, Washington, and is the duly appointed, qualified and acting administrator of the Estate of Oscar Carl Johnson, deceased.

## II.

At the time of his death, Oscar Carl Johnson had been divorced from his former wife for many years. His daughter, Betty Jane Johnson Grant, is the only surviving child of said decedent, and is named as his next of kin in shipping articles hereinafter referred to.

## III.

Respondent, Fireman's Fund Insurance Co. is a corporation organized under the laws of the State of California, and authorized to do and doing business in the State of Washington.

## IV.

On or about October 15, 1941, Oscar Carl Johnson, with the rating of boatswain and as a member of the crew of the S.S. Capillo, a merchant vessel of the United States of America, operated by the American Mail Line, a corporation, acting as agent of the United States War Shipping Administration, with cargo consisting of United States military supplies destined for Manila, Philippine Islands, signed written shipping articles of employment, which provided, among other things, that



the said American Mail Line would provide war risk insurance in the principal amount of \$5,000.00 upon the life of each member of the crew of said vessel who might while so employed lose his life as the result of any act of war such as capture, seizure, destruction or damage by men of war, piracy, takings at sea, arrests, restraints and detainments and other warlike operations and acts of Kings, Princes and peoples in prosecution of hostilities; and in accordance with said agreement, respondent, the Fireman's Fund Insurance Company assumed the obligation of said insurance, and issued its policy of war risk insurance No. 6622, on October 17, 1941, in the sum of \$2,000 for each crew member, and on November 5, 1941, in the sum of \$5,000 for each crew member, to the American Mail Line, Ltd., for the benefit of the crew of said vessel, including in said policy Oscar Carl Johnson, on said voyage from the Columbia River, Oregon, to Manila and way ports in the Pacific Ocean.

## V.

Thereafter, the respondent, United States of America, through its agency, the War Shipping Administration, issued by publication of certain regulations, a seaman's war risk policy of insurance, commonly called a "Second Seaman's War Risk" policy, providing war risk insurance to crew members of American flag ships, in the principal sum of \$5,000 for loss of life resulting from war and warlike operations generally, effective, however,

only in the event that such crew members be not already protected under such risks by other adequate insurance policies; said policy of Second Seaman's War Risk Insurance included and covered the said Oscar Carl Johnson, as aforesaid, in his employment as boatswain on the S.S. Capillo, only in the event that the United States of America or some officer or agency thereof made findings in accordance with the provisions of Title 46, U.S.C. Section 1128(a). That at no time did the United States or any officer or agency thereof find that it appeared or that it was a fact, that the conditions as set out in Section 1128(a), Title 46, U.S.C., as a prerequisite to furnishing war risk insurance or reinsurance upon the S.S. Capillo, existed with respect to said voyage so as to bring in force and effect said Second Seaman's War Risk insurance policy covering said Oscar Carl Johnson on said voyage. That in the absence of such finding, the said so-called Second Seaman's War Risk policy did not come into force and effect as to said Oscar Carl Johnson. And that at all times pertinent hereto the said policy of insurance of Fireman's Fund was in full force and effect as to said Oscar Carl Johnson and was adequate to cover the risks therein set forth. That the claim of libellant for the death of said Oscar Carl Johnson against said Fireman's Fund did not become liquidated until a judicial determination was made, as herein, as to the primary liability of the United States under applicable laws, rules and regulations.

## VI.

The said S.S. Capillo proceeded on her aforesaid voyage, and while moored at or near Manila Harbor in the Philippine Islands was attacked and destroyed by Japanese war operations, on or about December 29, 1941. Prior to said date, owing to illness, Oscar Carl Johnson had been admitted to an hospital at Manila, P. I. for treatment and had not been returned to the said vessel at the time of its destruction, and was never aboard subsequent to November 28, 1941, but at all times subsequent to execution of the shipping articles herein referred to, and up to the date of his death, he was and remained a member of the crew of said vessel. Subsequent to the destruction of said vessel all members of its crew, including Oscar Carl Johnson, were captured and interned or detained and imprisoned as war prisoners by the Japanese Government, then at war with the United States of America.

## VII.

As a direct and proximate result of the aforesaid warlike acts of the enemy Japanese, and by reason of their capture, arrest, restraint and detainment of Oscar Carl Johnson, and as a direct and proximate result of the treatment suffered by said seaman while a prisoner as aforesaid, the said Oscar Carl Johnson died in a Japanese war prisoner camp in the Philippine Islands, on or about August 6, 1943.

## VIII.

Respondents, and each of them, in writing, were notified of the detention and subsequent death, as

herein heretofore set forth, of the aforesaid Oscar Carl Johnson, and written demands were made upon each of the said respondents, for payment by them of the insurances provided by war risk insurance policies referred to in paragraphs IV and V of these findings, and at all times each of said respondents has denied and disclaimed any and all liability thereunder.

### IX.

That libellant has delayed pressing the claim against Fireman's Fund for trial in an effort to establish primary liability against the United States or to secure payment from the United States under the provisions of Title 50, U.S.C., Appendix .1292(b). That in view of such delay and the fact that the liability of said Fireman's Fund was contingent and unliquidated, it would be an abuse of discretion to allow interest on said claim prior to date of judgment herein.

Done in Open Court this 31st day of August, 1950.

/s/ PEIRSON M. HALL.

United States District Judge.

From the foregoing Findings of Fact, the Court now makes the following:

### Conclusions of Law

#### I.

Libellant's cause of action against respondent, United States of America, should be dismissed.

II.

That at all times after October 15, 1941, to and including the date of his death, said Oscar Carl Johnson was a member of the crew of the said S.S. Capillo.

III.

War Risk Insurance Policy No. 6922, written and issued by respondent, Fireman's Fund Insurance Company, dated October 17, 1941, with coverage of \$5,000 for loss of life by crew members of the S.S. Capillo as shown in shipping articles of said vessel dated on or about October 11, 1941, was in full force and effect at all times from and after October 17, 1941, and November 7, 1941, to and including the date of the death of said Oscar Carl Johnson on August 6, 1943, and constitutes complete and adequate war risk coverage for loss of life by Oscar Carl Johnson, a crew member of the said ship, while a prisoner of war.

IV.

The libellant herein is now entitled to recover of and from respondent, Fireman's Fund Insurance Company, a California corporation, judgment in the principal sum of Five Thousand Dollars (\$5,000), together with interest thereon at the rate of six per cent (6%) per annum from date of judgment until paid; and libellant is further entitled to recover his costs and disbursements in this action, to be taxed and allowed as provided by law and the practice of this court.



## V.

All the conclusions of law contained in the foregoing Findings of Fact, whether herein again stated or not.

Done in Open Court this 31st day of August, 1950.

/s/ PEIRSON M. HALL,  
United States District Judge.

OK as to form:

BOGLE, BOGLE & GATES,  
Proctors for Fireman's Fund  
Ins. Co.

Approved as to form:

/s/ VAUGHN E. EVANS,  
Of Proctors for Respondent,  
U. S. of A.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 31, 1950.

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In the United States District Court for the Western  
District of Washington, Northern Division  
In Admiralty No. 14918

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, deceased,  
Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-  
fornia corporation, and UNITED STATES OF  
AMERICA,

Respondents.

DECREE

This matter coming on regularly for trial August 15, 1950, all parties being represented by their respective counsel of record, evidence being presented and the Court having heard and considered the same, together with argument of counsel, and the Court having heretofore made, signed and entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that (1) the libellant's action against the United States of America is hereby dismissed; and (2) the libellant herein, James G. Mulroy, as Administrator of the Estate of Oscar Carl Johnson, do have and recover of and from, and he is hereby granted, judgment against respondent, Fireman's Fund Insurance Company, a California corporation, in the sum of Five Thousand Dollars (\$5,000), with interest thereon at the rate of six per cent (6%) per annum from date hereof, until paid, together with his costs and disbursements in this action to be taxed and allowed as provided by law and the practice of this Court.

Done in Open Court this 31st day of August, 1950.

/s/ PEIRSON M. HALL,

United States District Judge.

Presented by:

/s/ VAUGHN E. EVANS,

Assistant U. S. Attorney.

[Endorsed]: Filed and entered in Admiralty—  
Docket August 31, 1950.



[Title of District Court and Cause.]

NOTICE OF APPEAL BY RESPONDENT  
FIREMAN'S FUND INSURANCE COMPANY

To: James G. Mulroy, as Administrator of the  
Estate of Oscar Carl Johnson, deceased; J.  
Charles Dennis, United States District Attor-  
ney, and Vaughn E. Evans, Assistant United  
States District Attorney:

Please Take Notice that Fireman's Fund Insur-  
ance Company, a respondent in the above-entitled  
cause, hereby appeals to the United States Court of  
Appeals for the Ninth Circuit from the final decree  
of this court entered herein on the 31st day of  
August, 1950, and from each and every part of said  
decree.

Dated this 24th day of October, 1950.

BOGLE, BOGLE & GATES,  
Proctors for Respondent Fireman's Fund Insurance  
Co., a corporation.

ORDER ALLOWING APPEAL

It Is Ordered that the appeal herein be allowed  
as prayed for.

Done In Open Court this 24th day of October,  
1950.

/s/ JOHN C. BOWEN,  
U. S. District Judge.

Presented by:

/s/ EDW. S. FRANKLIN,  
Of Proctors for Respondent, Fireman's Fund In-  
surance Co.

[Endorsed]: Filed October 24, 1950.

[Title of District Court and Cause.]

CITATION

United States of America,  
State of Washington,  
County of King—ss.

The President of the United States.

To: James G. Mulroy, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased; and  
United States of America, and its proctors,  
Hon. J. Charles Dennis, United States District  
Attorney, and Vaughn E. Evans, Assistant  
United States District Attorney:

You are hereby cited and admonished to be and  
appear in the United States Court of Appeals for  
the Ninth Circuit forty days after the date of this  
citation pursuant to an appeal duly obtained from  
a decree of the District Court of the United States  
for the Western District of Washington, Northern  
Division, wherein Fireman's Fund Insurance Com-  
pany, respondent, is appellant, and you are appel-  
lees, to show cause, if any there be, why the said  
decree entered on August 31, 1950, should not be  
corrected and why speedy justice should not be  
done to the parties in that behalf.

Witness, the Honorable John C. Bowen, Judge  
of the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion, this 24th day of October, 1950.

[Seal]      /s/ JOHN C. BOWEN,  
U. S. District Judge.

[Endorsed]: Filed October 24, 1950.

[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

The appellant, Fireman's Fund Insurance Company, a corporation, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above entitled action as follows:

(1) The court erred in finding that libelant was entitled to recover under the war risk policy issued by Fireman's Fund Insurance Company for the death of Oscar Carl Johnson, deceased.

(2) The court erred in entering the decree herein.

BOGLE, BOGLE & GATES,  
Proctors for Fireman's Fund Insurance Company,  
a Corporation.

[Endorsed]: Filed October 24, 1950.

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[Title of District Court and Cause.]

### SUPERSEDEAS AND COST BOND

Know All Men By These Presents: That the undersigned principal and the undersigned surety are held and firmly bound unto the United States of America in the sum of Two Hundred and Fifty (\$250.00), and the further sum of Six Thousand Dollars (\$6,000.00) money of the United States, for the payment thereof to the benefit of whom it

may concern; that the said principal and the said surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seal on this 24th day of October, 1950.

The conditions of this obligation are such that

Whereas, respondent, Fireman's Fund Insurance Company, has appealed to the United States Court of Appeals for the Ninth Circuit from the decree of the District Court of the United States for the Western District of Washington, Northern Division, on the 31st day of August, 1950, which decree orders the said respondent Fireman's Fund Insurance Company to pay libellant, James G. Mulroy, the sum of Five Thousand Dollars (\$5,000.00) with interest thereon at the rate of 6% per annum, together with costs and disbursements; and

Whereas, the said Fireman's Fund Insurance Company, a corporation, desires, during the progress of such appeal, to stay the execution of said decree of the District Court.

Now, Therefore, the condition of this obligation is such that if the above named appellant, Fireman's Fund Insurance Company shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Court of Appeals for the Ninth Circuit in this cause, on the mandate of said court by the court below, then this obligation shall be void, otherwise the same shall remain in full force and effect.

FIREMAN'S FUND INSURANCE COMPANY,  
A Corporation.

By BOGLE, BOGLE & GATES,  
Its Proctors,  
Principal.

FIREMAN'S FUND INDEMNITY COMPANY,

[Seal] By /s/ F. J. SELLEN,  
Its Attorney in Fact,  
Surety.

This bond approved as to form and amount and sufficiency of surety.

Done In Open Court this 25th day of October, 1950.

/s/ JOHN C. BOWEN,  
United States District Judge.

Presented by:

/s/ EDW. S. FRANKLIN,  
Counsel for Bogle, Bogle & Gates, Proctors for Respondent, Fireman's Fund Insurance Co.

[Endorsed]: Filed October 25, 1950.

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[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

James G. Mulroy, Libellant and Cross-Appellant herein, hereby assigns error in the proceedings, decrees, orders and decisions of the United States District Court in the above entitled action, as follows:



1. The court erred in finding, ruling and entering a decree,

(a) That libellant was entitled to recover under the War Risk Insurance Policy issued by Fireman's Fund Insurance Company, for death of Oscar Carl Johnson, deceased, only the total principal amount of said policy, and costs, together with interest from August 31, 1950.

(b) Dismissing libellant's cause of action against Respondent United States of America.

2. Denying libellant's motion to vacate the Court's minute entered order dated August 16, 1950, directing that Judgment herein, "will carry interest only from the date of Judgment."

/s/ JAMES C. MULROY,  
Libellant and  
Cross-Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1950.

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[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL  
BY RESPONDENT

To: Fireman's Fund Insurance Co., a California Corporation, United States of America, and to Bogle, Bogle & Gates, J. Charles Dennis and

Vaughn E. Evans, Respondents and Their Proctors:

Please Take Notice that James G. Mulroy, Libellant in the above entitled cause, hereby cross-appeals to the United States Circuit Court of Appeals for the Ninth Circuit from all portions and parts of the final decree of this court, entered herein upon the 31st day of August, 1950, in which,

1. Libellant's cause of action against the respondent United States of America was dismissed,

2. Libellant was denied judgment of interest upon the amount awarded him by the aforesaid decree, from August 6, 1943, to August 31, 1950.

Dated at Seattle, Washington, November 20, 1950.

/s/ JAMES G. MULROY,  
Libellant.

The cross-appeal as hereinabove is allowed as prayed for.

Done in open court, November 20, 1950.

/s/ JOHN C. BOWEN,  
Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1950.

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[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON  
AND DESIGNATION OF RECORD

Cross-appellant, James G. Mulroy, herein, adopts his assignments of errors, heretofore herein filed,



as his statement of points upon which he intends to rely in this cross-appeal.

Said cross-appellant designates the entire record as necessary for consideration of this cross-appeal.

/s/ JAMES G. MULROY,  
Libellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 20, 1950.

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In the District Court of the United States for the  
Western District of Washington Northern  
Division

No. 14918

JAMES G. MULROY, as Administrator of the  
Estate of OSCAR CARL JOHNSON, De-  
ceased,

Libellant,

vs.

FIREMAN'S FUND INSURANCE CO., a Cali-  
fornia Corporation, and UNITED STATES  
OF AMERICA,

Respondents.

### TRANSCRIPT OF TESTIMONY

Before: The Honorable Peirson M. Hall,  
District Judge.

August 15, 1950

Be It Remembered, that on the 15th day of  
August, 1950, at the hour of 10:00 o'clock a.m., the

above entitled and numbered cause came on for trial before the Honorable Peirson M. Hall, one of the judges of the above entitled court, sitting in the United States Federal Court House, City of Seattle, County of King, State of Washington;

The libellant appearing by James G. Mulroy, Esq.;

The respondent, Fireman's Fund Insurance Company, appearing by Edward S. Franklin, Esq., and Robert V. Holland, Esq., of Bogle, Bogle and Gates;

The respondent, United States of America, appearing [1\*] by Vaughn Evans, Esq.;

Whereupon, the following proceedings were had and testimony given, to-wit:

The Court: Let a minute order be entered appointing Bernard Ayres to act as official stenographer of this court during this day's proceedings, which substitution for the regular reporter is made by reason of the fact that the official court stenographer of this court could not be present.

You may proceed.

Mr. Mulroy: May it please the Court, in the action now to be presented to Your Honor, I am the libellant, and it is my impression and belief that the ultimate issue, if not, indeed, the only real issue to be determined, and the \$64.00 question finally to be answered, is this:

When a war prisoner in custody dies of illness because the captor has deprived medical attendance of instruments needed for his effective treatment, is the death a proximate result of the capture?

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Well, counsel, by that statement you concede he died from tuberculosis? [2]

Mr. Mulroy: No, not tuberculosis, if Your Honor please, an abcess. I will introduce evidence as to the disease of which he died.

The Court: I see.

Mr. Mulroy: I do not concede anything that is not covered in the proof.

Inasmuch as the matters to be proven by the libellant are essentially contained within the four corners of the libel, I will give consideration to those first, and invite the Court's attention to the pleadings, setting out, if I can, the different interests. I take first the Fireman's Fund, the action against the Fireman's Fund.

The answer of that respondent admits all of the allegations of the libellant except paragraphs IV and VII. Number IV reads as follows:

“That Oscar Carl Johnson signed on with the rating of boatswain and as a member of the crew of the SS Capillo, a merchant vessel of the United States of America, operated by the American Mail Line, a corporation, on a voyage commencing at the Columbia River, Oregon, on or about the 15th day of October, 1941, for a voyage to Asiatic waters, under written articles of employment, which provided, among other things, that said vessel would carry a policy of war risk insurance [3] in the face amount of \$5,000.00 on the life of each member of the crew who might lose his life by reason of any act of war, arrests, restraints, intern-

ment or warlike operations; that in accordance with said agreements respondent Fireman's Fund Insurance Company issued its policy Number 6622 to the American Mail Line, Ltd., for the benefit of the crew of said vessel, including said policy Oscar Carl Johnson, on said voyage."

All the proof to be offered is documentary, if Your Honor please, and this paragraph will be supported by a photostatic copy of the shipping articles of that voyage and by a photostatic copy of Policy Number 6622 of the Fireman's Fund Insurance Company.

Number VII.

"That as a direct and proximate cause of the aforesaid warlike acts of the enemy Japanese, and because of their detention of, treatment and hardship inflicted upon the said Oscar Carl Johnson while he was interned as a prisoner of war in a Japanese prison camp in the Philippine Islands he died there on or about the 8th day of August, 1943."

In support of that will be introduced a case history of this man's illness during the time he was interned in the Japanese prison camp, and, also, the shipping articles [4] will show his death as of the 8th day of August, 1943—not the shipping articles, but I will introduce certain pages from the official log of the SS Capillo.

The Court: To show his death?

Mr. Mulroy: I beg your pardon, Your Honor?

The Court: To show his death?

Mr. Mulroy: To show his death, yes, Your Honor.

That is all that is controverted. Those two paragraphs are all the allegations of the libellant that are controverted by the Fireman's Fund, except I may call Your Honor's attention to the fact that the Fireman's Fund Insurance Company has not made any answer to Paragraph IX, which reads:

"That there is existing some question as to which of the aforesaid policies of insurance are or were payable upon the death of Oscar Carl Johnson, and a judgment should be entered herein against such respondent as may be shown by the evidence at the trial of this action to be liable thereon."

Turning now to the proof required as against the answer of the respondent, United States of America, the United States of America has denied, because of lack of knowledge or information sufficient to form a belief, Paragraphs I, II, III, IV and part of V, and VII. I, II, III, [5] IV and VII have been denied by the respondent, United States of America because of lack of knowledge or information sufficient to form an opinion. Paragraph V has been denied in part by the United States of America and admitted in part. The part which is denied is—I turn to paragraph V:

"That thereafter the respondent, United States of America, through its agency, the War Shipping Administration, issued a seaman's war risk policy of insurance, commonly referred to as a second seaman's war risk policy,



which provides for the payment of the sum of \$5,000.00 for loss of life, detention, and for various other things as the result of risk of war and warlike operations,”

and that portion of Paragraph V is admitted by the respondent, United States of America, and the balance of the paragraph which reads:

“and said policy included and covered Oscar Carl Johnson in his employment as boatswain on the SS Capillo,”

is denied. It is not denied——

“that neither said policy nor any copy thereof is in possession of the libellant, but such instrument or a copy thereof is in possession of the aforesaid War Shipping Administration as an agency [6] of the respondent United States of America.”

The Court: Well, they have been produced.

Mr. Mulroy: They will be produced. Yes, Your Honor.

Now, Number IX, Paragraph IX, which is the paragraph that I spoke of as stating that there is existing some question as to the liability, that was denied by the respondent, United States of America.

It is now my task to furnish proof as to the allegations of the libel which have been controverted by either one of the parties, and I take first the respondent, Fireman's Fund Insurance Company, and I will ask the clerk to mark in the appropriate manner for identification this exhibit.

(Letter and two enclosures from American Mail Line to Mr. James G. Mulroy, 1410 Hoge Building, Seattle 4, Washington, dated September 25, 1945, marked Libellant's Exhibit No. 1 for identification.)

The Court: What is it?

Mr. Mulroy: Exhibit 1 is a letter from the American Mail Line as agents for the——

The Court: (Interposing): Counsel have seen all these exhibits?

Mr. Franklin: I have not seen that one, if Your Honor please. [7]

(Exhibit in question exhibit to Mr. Franklin.)

Mr. Mulroy: Mark this.

(Photostatic copy of Fireman's Fund Insurance Policy No. 6622 marked Libellant's Exhibit No. 2 for identification.)

The Court: Have you seen Exhibit 2? You are?——

Mr. Franklin: If Your Honor please, this is my associate, Mr. Holland.

The Court: Very well. Have you seen Exhibit 2, Mr. Franklin?

Mr. Franklin: Yes, Your Honor.

The Court: Exhibit 2 is the copy of the Fireman's Fund Insurance Company policy.

Mr. Mulroy: I offer Exhibits 1 and 2 in evidence.

Mr. Franklin: No objection.

Mr. Evans: No objection.



The Court: Admitted.

(Documents previously marked as Libellant's Exhibits 1 and 2 for identification received in evidence.)

LIBELLANT'S EXHIBIT No. 1

American Mail Line  
740 Stuart Building Seattle 1, Washington

September 25, 1945

Mr. James G. Mulroy  
1410 Hoge Building  
Seattle 4, Washington

Dear Sir:

S/S "CAPILLO"

Oscar Carl Johnson, Deceased

In accordance with your request, we attach hereto copy of Medical report dated August 7, 1943, and copy of Funeral expense invoice dated August 9, 1943, both in connection with the late Oscar Carl Johnson.

Very truly yours,

UNITED STATES OF AMERICA WAR SHIP-  
PING ADMINISTRATION,  
AMERICAN MAIL LINE, LTD.,  
General Agents,

By /s/ R. A. CLANCEY.

EFM:eg

Enclosure (2)

FUNERARIA NACIONAL

917-919 Ave. Rizal

Manila

Manila, P. I., August 9th, 1943

Mr. P. B. Neubauer,

c/o Everett Steamship Corp., Agents.

To Funeral Services Rendered the Late Oscar Carl  
Johnson.

To use of one temporary casket.

“ mortuary decoration and deposit in the  
Chapel.

“ use of one funeral hearse automobile for the  
transportation of the remains to the  
Crematory.

“ temporary preservation of the remains.

“ Health requisitions and permits fees.

“ one cremation board.

“ cremation fees at the San Lazaro Hospital  
Crematory.

200.00

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Total Services: Two Hundred Pesos....

Received Payment

FUNERARIA NACIONAL,

By /s/ ANTONIO QUIOGUE,

Manager.

August 9 Official cremation receipt  
#0137816 ..... 30.00

August 9 Transportation to and from Crema-  
torium for Mr. Lundquist and Mr.  
Neuham to witness cremation... 2.00

August 11	For one Wreath .....	10.00
		<hr/>
		\$12.00

(Copy)

Santa Catalina Hospital  
Santo Tomas Internment Camp, Manila

Name: Johnson, Oscar Carl

Nat.: American

Occupation: Seaman

Date: August 7th, 1943

Age: 45

Sex: Male

Room:

This patient was first seen on January 8, 1942, only a day or so after the Internment Camp started and although the record is very scanty at that point, a diagnosis of pulmonary tuberculosis was made. On that basis, permission was obtained from the Camp authorities to transfer him away from the Internment Camp. He was at San Lazaro Hospital from January 10, 1942, to April 28, 1942—107 days, and what happened during that time is obscure. He was very dissatisfied in that hospital and was transferred to the Philippine Tuberculosis Hospital which was then situated in the old buildings of the San Juan de Dios Hospital. He was there from April 28 to August 20—115 days. A diagnosis was made of abscess of the lung. Later on the writer of this record (H. L. Robinson, M.D.) went to the hospital and saw X-Ray films taken during his stay.

One of them, at any rate was taken after the intra-bronchial installation of an opaque fluid, for it showed shadows of such fluid in the lower right bronchus without evidence of bronchiectasis. There was a large abscess cavity about the level of the anterior end of the fourth rib with a fluid level and much evidence of infiltration below and around the cavity. The diameter of the cavity was about three times the width of a rib. The opaque fluid did not enter the cavity. A lateral film showed that the cavity was in the central portion of the lung. There was no evidence of silicosis or of tuberculosis. The patient stated that the physicians at the hospital told him definitely that he was not tuberculous and should not be in a hospital for tuberculosis. From August 20 to October 4, 1942—45 days—he was in the Philippine General Hospital and their letter of October 22 said “The following final diagnoses: Bronchial asthma; pulmonary tuberculosis, chronic (?).” He then returned to camp and was in the Camp Hospital from October 4 to October 10—6 days—and his cough was so severe that it annoyed the other patients, consequently he was sent to Sulphur Springs, a branch Internment Camp for sufferers from chronic disease. He was there from October 10 to October 21—11 days. He was very dissatisfied with the food and the facilities there and insisted upon returning to the Camp Hospital. He was in the Camp Hospital from October 21, 1942, to August 6, 1943, the date of his death—a total of 289 days. During that time he often tried postural drainage with rather unsat-

isfactory result. He gradually lost weight, often had swelling of the ankles and occasional attacks of asthma. On January 7, 1943, he had a small hemoptysis and on February 2, another, of about 200 c.c. There was another small one on March 3. From the X-ray film it was the judgment of this writer that nothing would be effective except a lobectomy. I interviewed Doctor Canizares personally. He is the leading thoracic surgeon in the Philippines. He said that having been deprived of some of his equipment he was unwilling to even consider doing a lobectomy on anyone. For more than a year, I have been urging that the man be accommodated on any repatriation vessel which should leave the Philippine Islands but there has been no such opportunity. Late in July, 1943, the man had a small hemoptysis and again on August 6 at 9:00 p.m. he had a very large pulmonary hemorrhage, witnessed by Doctor D. Borja, amounting to 500 cc of blood, more or less. The man lost consciousness, never became conscious again and died at 9:20 p.m., D.S.T.

Diagnosis:

Abscess of the Right Lower Lobe of the Lung,  
Non-Tuberculous

/s/ HUGH L. ROBINSON, M.D.,

Staff Physician, Santa Catalina Hospital, Santo  
Tomas Internment Camp.

Dr. Hugh L. Robinson,  
165 Grove Street,  
Auburndale, Massachusetts, U. S. A.

Admitted August 15, 1950.



LIBELANT'S EXHIBIT No. 2

\$104.00.

No. 6622

Fireman's Fund  
Insurance Company  
San Francisco, California

4 copies sent

Saunders (Hall Murphy) 10% mp

By This Policy of Insurance  
American Mail Line, Ltd.

Does Insure

.....as follows:

In Consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of Seven Hundred Eighty Dollars (\$780) as a premium at and after the rate of  $\frac{3}{4}$  per cent for such Insurance the said Company takes upon itself the burden of such Insurance in the amount of One Hundred and Four Thousand Dollars (\$104,000) and promises and agrees with the assured, their Executors and Administrators in all respects truly to perform and fulfill the Contract contained in this Policy. And it is hereby agreed and declared that the said Insurance shall be and is an Insurance upon Protection and Indemnity Risks in respect to liability of the Assured for claims for loss of life, injury or disability as per slip attached, and is warranted free of all other claims of and in the good Steamer called the "Capillo" or by whatsoever other name or names the said ship is or shall be named or called, lost or not lost, at and from Columbia River port or ports

(sailing on or about October 15, 1941) to Shanghai, Hongkong, Philippine Islands port or ports, while there and return to Columbia River and/or Puget Sound port and/or ports or until the expiration of one hundred days (100) from moment vessel sails from first Columbia River port, whichever may occur first, or held covered.

~~Touching the adventures and perils which the~~ said Company is content to bear and does take upon itself; they are of the seas, fires, pirates, rovers, assailing thieves, jettisons, criminal barratry of the master and mariners, and of all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the aforesaid subject matter of this insurance or any part thereof.

In case of any loss or misfortune it shall be lawful and necessary for the Assured, their factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard, and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance; the charges whereof the said Company shall bear in proportion to the sum hereby insured.

It is expressly declared and agreed that no acts of the said Company or Assured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

In Witness Whereof the Fireman's Fund Insurance Company has caused this policy to be signed by its duly authorized officers in the City of San Francisco, State of California, this 17th day of October, one thousand nine hundred and forty-one.



Not Valid Unless Countersigned by R. T. Saunders, Manager, Seattle, Washington.

Countersigned .....  
Manager.

This Policy Covers War Risk Only  
As Follows and Is  
Warranted Free of All Other Claims

This insurance covers only contractual liability of the assured for claims for loss of life or injury to or disability of licensed personnel, not exceeding eight (8) and unlicensed personnel, not exceeding thirty-two (32), as result of capture, seizure, destruction or damage by men of war, piracy, takings at sea, arrests, restraints and detainments and other warlike operations and acts of Kings, Princes and Peoples in prosecution of hostilities, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution or rebellion or insurrection, or civil strife arising therefrom, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes. In no case shall liability of these Underwriters exceed \$5,000—each in respect to licensed personnel nor \$2,000—each in respect to unlicensed personnel.

#### Schedule One

The Assurer will pay, in case of loss, an amount to be determined by applying the percentage shown below to the amount for which the master, officer, or member of the crew is insured, as follows:

Life .....	100%
Both hands .....	100%
Both arms .....	100%
Both feet .....	100%
Both legs .....	100%
Both eyes .....	100%
Hand .....	50%
Arm .....	65%
Foot .....	50%
Leg .....	65%
Eye .....	45%
Total destruction of hearing.....	50%

The indemnities referred to above are payable, provided loss results directly and exclusively from bodily injuries, within ninety (90) days from the date of accident. Loss shall mean, with regard to hands and feet, arms and legs, dismemberment by severance at or about wrist or ankle, knee or elbow joints, or the complete and irrecoverable loss of function. With regard to eyes, complete and irrecoverable loss of sight. With regard to hearing, total and irrecoverable loss of hearing in both ears.

### Schedule Two

For injury not described in Schedule One, but not for illness, resulting in permanent disability preventing the person injured from performing any and every kind of duty pertaining to such person's occupation, the Assurer will pay compensation at the same rate as the earnings of the injured person immediately preceding the injury, payments to be made in monthly installments, until such time

as the total compensation as paid shall amount to the principal sum for which the injured master, officer or member of the crew is insured.

Notwithstanding anything herein contained to the contrary, it is agreed this insurance shall not be vitiated by a deviation or change of voyage of the vessel, in which event an additional premium shall be paid if required.

Non-payment of Premium Clause—The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within ten (10) days after attachment of the insurance, this policy may be cancelled at any time thereafter by the Assurer giving to the Assured named herein five (5) days notice of such cancellation.

Loss, if any, subject however to all the terms and conditions of this policy, is payable to American Mail Line Ltd. for distribution by it in accordance with agreement made with each seaman concerned.

Attached to and made a part of Policy No. 6622 of the Fireman's Fund Insurance Company issued to American Mail Line Ltd. per S.S. "Capillo."

(Copy)

Endorsement  
Seattle, Washington

November 5, 1941

In consideration of the payment of an additional premium of \$720, it is hereby understood and agreed that effective October 18, 1941, the amount

insured in respect to unlicensed personnel is increased from \$2,000 each to \$5,000 each and the total amount insured under policy to which this endorsement is attached is increased from \$104,000 to \$2,000,000.

Warranted no known or reported loss as of October 18, 1941.

It is further understood and agreed voyage during which vessel is insured hereunder is changed to read as follows:

at and from Columbia River port or ports (sailing on or about October 15, 1941) via Honolulu to Shanghai, Hong Kong, Philippine Island port or ports, while there and return to Columbia River and/or Puget Sound port and/or ports or until the expiration of one hundred (100) days from moment vessel sails from first Columbia River port, whichever may occur first, or held covered.

All other terms and conditions remain unchanged.

Attached to and made part of policy number 6622 of the Fireman's Fund Insurance Company issued to American Mail Line Ltd. per Steamer "Capillo."

FIREMAN'S FUND INSURANCE COMPANY,

By COPY,

Agent.

Admitted August 15, 1950.

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The Court: Do you wish to use either one of these?

Mr. Mulroy: When Your Honor is through with them, I wish to make certain comments on them.

The Court: I will read this. The provisions [8] of the policy have previously been quoted in the memorandum by the Fireman's Fund?

Mr. Franklin: Yes, Your Honor.

The Court: And this report signed by Robinson is the one quoted in your memorandum, as well?

Mr. Franklin: I think, if Your Honor please, as it is set out in my demand for genuineness of documents.

The Court: Oh, yes.

Mr. Mulroy: If Your Honor please, I acquiesced in that demand and offered no objection.

The Court: Very well. I read that just before I came on the bench.

Mr. Mulroy: In offering Exhibit 1 at this time, I do so in order to answer at once your Honor's question as to the cause of death. This certificate is a case report by Hugh L. Robinson who apparently was the attending physician of the decedent, Oscar Carl Johnson.

"This patient was first seen on January 8, 1942, only a day or so after the Internment Camp started, and although the record is very scanty at that point, a diagnosis of pulmonary tuberculosis was made. On that basis, permission was obtained from the Camp authorities to transfer him away from the Internment Camp. He was at San Lazaro Hospital from January 10, 42, to April 28, 1942—107 days;



and [9] what happened during that time is obscure. He was very dissatisfied in that hospital and was transferred to the Philippine Tuberculosis Hospital which was then situated in the old buildings of the San Juan de Dios Hospital. He was there from April 28 to August 20—115 days. A diagnosis was made of abscess of the lung. Later on the writer of this record (H. L. Robinson, M. D.) went to the hospital and saw X-ray films taken during his stay. One of them at any rate was taken after the intra-bronchial installation of an opaque fluid, for it showed shadows of such fluid in the lower right bronchus without evidence of——

The Court: Oh, go ahead. Nobody knows how to pronounce it anyway.

Mr. Mulroy (Continuing): “There was a large abscess cavity about the level of the anterior end of the fourth rib with a fluid level and much evidence of infiltration below and around the cavity. The diameter of the cavity was about three times the width of a rib. The opaque fluid did not enter the cavity. A lateral film showed that the cavity was in the central portion of the lung. There was no evidence of silicosis or of tuberculosis. The patient stated that the physicians at the hospital [10] told him definitely that he was not tuberculous and should not be in a hospital for tuberculous. From August 20 to October 4, 1942—45 days

—he was in the Philippine General Hospital and their letter of October 22 said “The following final diagnosis: Bronchial asthma; pulmonary tuberculosis, chronic (?).” He then returned to camp and was in the Camp Hospital from October 4 to October 10—6 days—and his cough was so severe that it annoyed the other patients, consequently he was sent to Sulphur Springs, a branch Internment Camp for sufferers from chronic disease. He was there from October 10 to October 21—11 days. He was very dissatisfied with the food and the facilities there and insisted upon returning to the Camp Hospital. He was in the Camp Hospital from October 21, 1942, to August 6, 1943, the date of his death—a total of 289 days. During that time he often tried postural drainage with rather unsatisfactory result. He gradually lost weight, often had swelling of the ankles and occasional attacks of asthma. On January 7, 1943, he had a small hemoptysis and on February 2, another, of about 200 cc. There was another small one on March 3. From the X-ray film it was the judgment of this writer that nothing would be effective except a lobectomy. I interviewed [11] Doctor Canizares personally. He is the leading thoracic surgeon in the Philippines. He said that having been deprived of some of his equipment he was unwilling to even consider doing a lobectomy on anyone.”



The Court: Just a minute. What is a hemoptysis?

Mr. Mulroy: I have not examined the meaning of that, but I think it means nothing more or less than a hemorrhage.

The Court: Is that what it means?

Mr. Franklin: That is what it means, if Your Honor please.

Mr. Mulroy: "For more than a year I have been urging that the man be accommodated on any repatriation vessel which should leave the Philippine Islands, but there has been no such opportunity. Late in July, 1943, the man had a small hemoptysis and again on August 6 at 9:00 p.m. he had a very large pulmonary hemorrhage, witnessed by Doctor D. Borja, amounting to 500 cc of blood, more or less. The man lost consciousness, never became conscious again, and died at 9:20 p.m., D.S.T."

The final diagnosis is: "Abscess of the right lower lobe of the lung, non-tuberculous."

Inasmuch as Paragraph IV of the libel was controverted by the respondent, Fireman's Fund, I consider it necessary to offer in evidence the shipping articles of the S.S. Capillo on the voyage referred to in this action.

The Court: That will be Number 3.

(Shipping Articles referred to, a photostatic copy, marked Libellant's Exhibit Number 3 for identification.)

The Court: Is this to prove that he signed on?

Mr. Mulroy: That he signed on as a boatswain, was a member of the crew of the Capillo, a merchant vessel of the United States of America——

The Court: Have you examined this, Mr. Franklin?

Mr. Franklin: Yes, Your Honor.

Mr. Mulroy (Continuing): ——on a voyage commencing at the Columbia River, Oregon. It will be noted from that exhibit that Oscar Carl Johnson's name appears as the boatswain; that he has designated Betty Jane Johnson Grant, his daughter, as next of kin.

The Court: Very well.

Mr. Mulroy: In connection with Paragraph IV, I have already introduced the respondent, Fireman's Fund Policy Number 6622.

The Court: Well, now, does a boatswain come under licensed personnel or unlicensed personnel?

Mr. Mulroy: I am not sure about that, and I consider it not necessary to acquaint myself.

Mr. Franklin: We will concede that a boatswain is an unlicensed personnel, if Your Honor please.

The Court: Unlicensed personnel?

Mr. Franklin: Yes, Your Honor.

Mr. Mulroy: The policy of insurance in the first place insured for \$5,000.00 the lives of licensed personnel and \$2,000.00——

The Court (Interposing): There was a rider attached?

Mr. Mulroy: Yes.

The Court: So the amount involved is \$5,000.00, too?

Mr. Mulroy: Yes, Your Honor.

The Court: Very well.

Mr. Mulroy: I should like to glance at that exhibit, if Your Honor please.

The Court: You mean the policy?

Mr. Mulroy: Yes, that last one.

The Court: Here, you can have them both.

Mr. Mulroy: This policy, Exhibit Number 2, was issued in consideration of a premium, and in return for that premium the company takes upon itself the burden of such insurance in the amount of \$104,000.00 for protection [14] and indemnity risks in respect to liability of the assured for claims for loss of life, injury or disability as per slip attached, and is warranted free of all other claims.

The Court: Well, if I understand the preliminary statement filed by the Fireman's Fund, there is no question about its terms, the amount involved, or the payment of the premium, or the fact that it was in force and effect at all times involved in this action.

Mr. Franklin: That is correct, Your Honor.

Mr. Mulroy: I next——

The Court: And the Fireman's Fund position, insofar as he being a member of the crew, or the boatswain, is simply that you refer the libellant to be on his proof.

Mr. Franklin: That is correct, Your Honor.

Mr. Mulroy: I have now certain sheets taken from the official log book of the Capillo, numbers

9, 10, 12, 13, 17 and 25. These are photostatic records of the log for the purpose of showing to the Court any mention that was made of the services of Oscar Carl Johnson, and, also, to show the fact that the ship was bombed and that she was at the time of her bombing subject to the orders of the naval authorities at Manila, and I offer this. Will you mark this for identification?

(Pages 9, 10, 12, 13, 17 and 25 from official log book of S.S. Capillo, marked Libellant's Exhibit No. 4 for identification.) [15]

The Court: Well, is there any question about the fact that after December 7, 1941, the ship was then, and at all times thereafter, subject to the orders of the naval authorities insofar as either the Fireman's Fund or the United States is concerned?

Mr. Franklin: No, Your Honor.

Mr. Evans: I do not believe there is any denial of that.

The Court: In other words, she could not have left Manila without the consent of the naval authorities.

Mr. Evans: I believe that is correct.

The Court: And there is not any question but what she was bombed and that the crew was interned.

Mr. Mulroy: It was controverted in the record here. Those things were controverted, and I now offer proof on them.

The Court: Will counsel concede it?

Mr. Franklin: We will concede that the bomb-

ing occurred December 27th, I believe the record shows, doesn't it, Mr. Mulroy, 1941?

Mr. Mulroy: I think it is the 29th, probably.

The Court: Well, the 27th or 29th, it does not make any difference.

Mr. Mulroy: Whatever is shown in the log.

The Court: Yes. [16]

Mr. Mulroy: Whatever the date is as shown in the log.

The Court: And that thereafter the entire crew, including Mr. Johnson, was interned?

Mr. Mulroy: Yes.

The Court: By the Japanese.

Mr. Mulroy: Yes.

The Court: And he remained interned until the day of his death.

Mr. Mulroy: Yes.

The Court: Is there any doubt about that?

Mr. Franklin: If I may interject, I think, as we mentioned in our memorandum, the evidence shows that Johnson was taken off the ship at Manila when it arrived there on November 27th because of sickness or illness; that the Capillo remained in Manila until the 27th, a month later, at which time the Japanese entered the city, bombed the ship, and the crew members on the ship were taken into custody; and sometime later Johnson, who had been ashore for a month because of his illness, was apparently captured by the Japanese and interned with the rest of them.

Mr. Mulroy: The log I am offering will show all this.



The Court: I understand, but if counsel is willing to concede it, why bother about the evidence?

Mr. Mulroy: He was taken ashore, according to the log, on the 28th of November.

The Court: All right. Now, does this show, also, the first occasion of the onset?

Mr. Mulroy: That shows that there was some heavy machine gunning a day or so before she was finally bombed.

The Court: No, I mean the onset of his incapacity.

Mr. Mulroy: It was before, yes. There had been no trouble before the time he went to the hospital.

Mr. Franklin: I think it shows, if Your Honor please, that at Port Moresby he was sent to the hospital.

The Court: Port Moresby, November 17th.

Mr. Franklin: Yes.

The Court: "Oscar Johnson, Boatswain, who had been sick several days, had doctor attention at Port Moresby. Medicine was supplied."

"Manila, November 28th. Oscar Johnson, Boatswain, was taken to St. Paul's Hospital at this port for treatment."

Well, does this show that he stayed there?

Mr. Mulroy: It does show that he stayed there, so far as the log could show that. That, of course, is the log prepared by the skipper of the *Capillo*, and it terminates, [18] I think, by the final entry of his death.

The Court: Yes. It says: "Manila, August 6th,



1943. Oscar E. Johnson, Boatswain, who has been very sick, and in the hospital since the vessel arrived at Manila November 28th, 1941, died August 6th at 9:00 p.m. He had had a hemorrhage. Johnson has a daughter, Betty Johnson, 8618 - 8th Avenue N.E., Seattle, Washington. He was cremated on August 9th, 1943."

All right.

Mr. Mulroy: Mark this as an exhibit.

(Order approving administrator's final report and petition for distribution in the matter of the estate of Oscar Carl Johnson, No. 93046, in the Superior Court of the State of Washington, in and for King County marked Libellant's Exhibit No. 5 for identification.)

Mr. Mulroy: This exhibit is a certified copy.

The Court: You have seen this, have you, counsel?

Mr. Franklin: No, I have not.

Mr. Evans: I have not seen that either. I would like to look at it, if I may.

(Exhibit in question exhibited to counsel of record.)

Mr. Mulroy: I offer this in evidence, if Your Honor please. [19]

Mr. Franklin: No objection.

Mr. Evans: No objection.

The Court: Admitted.

(Document previously marked Libellant's Exhibit No. 5 for identification received in evidence.)

LIBELLANT'S EXHIBIT No. 5

In the Superior Court of the State of Washington  
In and For King County  
In Probate No. 93046

In the Matter of the Estate of  
OSCAR CARL JOHNSON,

Deceased.

ORDER APPROVING ADMINISTRATOR'S  
FINAL REPORT AND PETITION FOR  
DISTRIBUTION

This matter coming on regularly for hearing before the undersigned judge of the above entitled court, upon the 20th day of December, 1945, upon the petition of James G. Mulroy, administrator of the above entitled estate; and it appearing to the court that due notice of the time and place of this hearing has been duly and properly published and posted as requested by law, and the court having heard testimony in support of the said administrator's petition, and being in all matters fully advised thereon, finds as follows:

Upon the 6th day of August, 1943, the decedent, Oscar Carl Johnson, died intestate, at the Santa Catalina Hospital, Santo Tomas Internment Camp, Manila, Philippine Islands. The decedent had been a seaman, enrolled as a boatswain of the American Line Steamship "Capillo" which was destroyed by Japanese forces on or about December 8, 1941. At the time of his death he was a resident of Seattle, Washington, and left an estate in King County,

Washington, consisting of unpaid wages, and other allowances, due to him from his employers, the aforesaid American Mail Line Steamship Company, with its principal place of business in Seattle, Washington, aggregating \$2,629.12. In addition to the foregoing, the administrator has filed a claim against the Fireman's Fund Insurance Company for payment upon a blanket policy of life insurance believed to have covered the above named decedent as a member of the crew of the above mentioned Steamship "Capillo." This claim has not been paid and it may be necessary to institute litigation in order to collect the same.

Upon the 14th day of May, 1945, the petitioner was appointed administrator of the above entitled estate, has duly qualified as such, and at all times since has been and now is acting as such administrator.

Oscar Carl Johnson, the decedent herein, was a widower, and the following named person is his only surviving heir, to wit: Betty Jane Johnson Grant, residing in Chicago, Illinois.

Notice to creditors of the above named decedent was published as provided by law in the Daily Journal of Commerce, a newspaper of general circulation in King County, Washington, the date of first publication being the 15th day of May, 1945, and more than six months have elapsed since said date, and no claims whatever have been filed or presented to the administrator.

The administrator has heretofore caused an inventory of the property of this estate to be made

and filed in this proceeding, and appraisers duly appointed by this court have appraised said property and fixed the value thereof at the sum of \$2,629.12, which the administrator has collected from the aforesaid American Mail Line Steamship Company, and all of which is now in his possession.

There is no inheritance tax due to the State of Washington, nor to the United States of America from this estate.

In the administration of the above entitled estate the administrator has incurred and paid the following items of expense:

Filing Final Report .....	\$ 5.00
Filing fee .....	5.00
Publishing Notice to Creditors .....	4.53
Premium on bonds.....	30.00
Certified copies .....	2.80
Notice of hearing petition for distribution .....	4.20
<hr/>	
Total	\$51.53

The administrator has received no compensation for his services herein, and the foregoing expenses have been paid by him from his personal funds. The sum of \$125.00 should be and is hereby allowed to the said administrator in compensation for his services herein, and the foregoing expenses of \$51.53 are hereby allowed and the administrator is directed to compensate himself thereof from funds of the estate now in his possession.

And it appearing further to the court that there

may be additional property or funds which may come into the possession of the administrator, and that for that purpose this estate should remain, until the further order of the court, open for the purpose of administering such funds or property; Now, Therefore,

It Is Hereby Ordered that the final report and petition for distribution of James G. Mulroy, administrator herein, be and the same is hereby in all things approved.

It Is Further Ordered that the said administrator be and he is hereby awarded the sum of \$125.00 in payment for services rendered herein to date, and said administrator is allowed the sum of \$51.53 in payment of expenses aforesaid by him expended in the administration of this estate.

It Is Further Ordered that this estate remain open, subject to the further order of the court for the purpose of administering such further funds or property which may become a part of said estate.

It Is Further Ordered that the administrator herein, upon deducting from the funds now in his possession the aforesaid allowances totaling \$176.53, shall forthwith remit the balance of any and all funds now in his possession to the daughter of the decedent, Betty Jane Johnson Grant.

Done In Open Court this 20 day of Dec., 1945.

/s/ JOHN A. FRALEI,  
Judge.

Presented by:

/s/ JAMES G. MULROY.



State of Washington,  
County of King—ss.

I, Norman R. Riddell, County Clerk of King County, and ex-officio Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original Instrument as the same appears on file and of record in my office and that the same is a true and perfect transcript of said original and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this 11 day of August, 1950.

NORMAN R. RIDDELL,  
Clerk.

[Seal] By /s/ WM. R. WELCH,  
Deputy Clerk.

Admitted August 15, 1950.

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Mr. Mulroy: I have asked on the next one, which is Paragraph V, denied by the—part of it was denied by the respondent, United States of America. I have asked for a production of the Second Seaman's War Risk, or a copy of it.

Mr. Evans: That is set forth in the Code of Federal Regulations. For the purpose of the record, it is set out in the 1934 Supplement of the Code of Federal Regulations beginning on page 2127.

The Court: Of what volume, or—



Mr. Evans Under Title 46, Book II of the 1934 supplement. Certain minor amendments, which I do not believe pertain to this case, are set out in the 1944 supplement beginning on page 3774.

It is my understanding that no policy, as we normally consider an insurance policy, was actually issued that one could take and put in the safety deposit box, but that these sections which I have referred to, the Code of Federal Regulations, are the terms of the second seaman's war risk policy.

Mr. Mulroy: And it indicates the parties covered by those policies. In other words, there is an automatic coverage.

Mr. Evans: That is correct.

The Court: According to the terms of the policy and the statute?

Mr. Evans: Yes. If any such policy is issued, these are the terms that cover such policy whether or not an actual policy is written up in one form or another.

The Court: Well, under the regulations is there some certificate that is given to the ship, or to the ship's company, or is it just automatic?

Mr. Evans: Under certain conditions it is automatic, is my understanding.

The Court: What are the conditions under which it became automatic?

Mr. Evans: That is one of the matters that the defense, as far as the Government is concerned,—

The Court (Interposing): Well, let us assume that he is not covered by it and was covered by the ship. Do you contend it did not cover the ship?

Mr. Evans: That it did not cover Oscar Carl Johnson.

The Court: Well, then, let us find out what you contend when it does become automatic. [21]

Mr. Evans: It is set out in what is commonly referred to in War Shipping Administration files as Public Law 17.

The Court: Is that 50 Appendix 1291 and 1292?

Mr. Evans: That is correct, Your Honor.

Mr. Franklin: If it would assist the court, I have an extra copy. I am not interested, but I happen to have it, if it would assist the court.

The Court: All right. 1291 and 1292. Apparently 1293, also.

Mr. Evans: The particular section that the Government intends to rely upon mainly is covered in Section 1292.

The Court: Well, what I am trying to get at now, when does the policy automatically become effective? Is that set forth in 1291 or 1292?

Mr. Evans: Well, I do not believe we have denied that the policy——

Mr. Mulroy: There is an admission, if Your Honor please, that the policy was issued, that is, that it did become effective. It is challenged that Oscar Carl Johnson was included in it.

Mr. Evans: Yes, I believe that is our position, that we do not deny that the policy covered the vessel, the crew members of the vessel, but we deny that it covered Mr. [22] Johnson.

The Court: Do you deny that it covered him at

all, or do you deny that it covered him in this particular situation?

Mr. Evans: I believe that we deny that it covered him in this particular situation, and, also, that it covered him at all after the date he left the ship.

The Court: Well, you tell me what your position is and maybe it will save me reading.

Mr. Mulroy: In regard to this policy?

The Court: Yes.

Mr. Mulroy: I will invite Your Honor's attention to Paragraph VI of the Libel.

"That said ss "Capillo" proceeded on her voyage and while in Oriental waters was attacked and destroyed by Japanese war operations on or about the 29th day of December, 1941, and thereafter all members of the crew of said vessel, including Oscar Carl Johnson, were interned and imprisoned in the Philippine Islands as acts of war by Japanese military forces."

That paragraph of the Libel, if Your Honor please, was admitted by both parties; that he was a member of the crew; that he was interned and imprisoned in the Philippine Islands as acts of war by Japanese military forces. If the policy covers any member of the crew, it covers Johnson [23] under that allegation.

The Court: I would still like to find the provision of the statute which makes this policy automatically effective.

Mr. Mulroy: Perhaps I can aid the Court. My conception of that automatic business—I must say

that I am not as firmly on my feet as I would like to be on that question, but I interpret it somewhat like this, subject to correction, that where there is a policy existing, that does not adequately cover the insured man, then the provisions of 1292 come into effect. We have that situation here. Your Honor will remember asking counsel, Mr. Franklin, if he admitted that the policy was in effect at the time the voyage was started and thereafter. And Mr. Franklin said—if I remember correctly, he said that was the case. So here we have a policy, commercial insurance, and that was much stressed, I think, in the file of correspondence and proceedings of the War Shipping Board, which under a stipulation was to be admitted in evidence,—

The Court: Well, let me see now, the so-called second policy, or whatever you call it, of the United States, is that liability does not attach unless other insurance is inadequate.

Mr. Mulroy: That is correct. But 1292 is written particularly where there is other insurance in effect. [24]

Now, it has been hinted to me—

The Court: In other words, must the Court make a determination as to whether or not the other policy is adequate?

Mr. Mulroy: Exactly.

The Court: In other words, suppose I should decide against you with relation to the Fireman's Fund? Would that then be considered inadequate?

Mr. Mulroy: Exactly, Your Honor.

The Court: That means we still have got to find when this law applies, when it attaches.

Mr. Mulroy: It has been hinted to me, Your Honor, that I overlooked something in not claiming a recovery under both policies, but I think such procedure would be grasping, and, besides, it might be difficult to sustain. So I have taken this position: All we ask is recovery under one policy or the other, and that is why Paragraph IX was inserted in the libel.

The Court: Oh, you are not seeking, then, recovery on both policies.

Mr. Mulroy: That is right. I am seeking recovery on one policy. It is my impression that the beneficiaries of this seaman are entitled to that coverage. I do not believe it was ever the intention of the writers of legislation, in respect to seamen taking war risk actions, that [25] they should be covered by two policies covering the same risk.

The Court: That is by Article I of the form which Mr. Franklin handed up to me here, Article I of the policy.

“The persons insured by this policy are the master, officers and crew of the vessel described on the face of this policy \* \* \* entitled to coverage under this policy while such other insurance is in force and effect.”

Is that the clause you had reference to?

Mr. Mulroy: I have——

The Court: Or do you know?

Mr. Mulroy: Well, I must say that I am a little bit hazy about——



The Court: You are not nearly as foggy as I am about it.

Mr. Mulroy: In view of my recent active entry into the prosecution of this case, I have not been able to digest some of the verbiage used in those policies and in that legislation, but I have taken the position that we have an absolutely going and current life insurance policy, and we have a policy that will take effect if this is not sufficient; that is, the Government policy is one which automatically steps in and rights the wrongs, and that is what we are suing on. And I wish to say that I have——

The Court: Well the proof that you have [26] heretofore offered, then, is offered against the Government as well.

Mr. Mulroy: Oh, yes.

The Court: Insofar as it is applicable.

Mr. Mulroy: That is exactly it.

The Court: And now you rest, then, as to both the Government and the Fireman's Fund?

Mr. Mulroy: I have just a word more to say.

I have offered proof, I think, on every part of the complaint except under Paragraph IX.

“That there is existing some question as to which of the aforesaid policies of insurance are or were payable upon the death of Oscar Carl Johnson, and a judgment should be entered herein against such respondent as may be shown by the evidence at the trial of this action to be liable thereon.”

I think the fact that this lawsuit could be brought at all amply supports that allegation; but if it is insufficient, I feel sure that the contents of the file,



which has been agreed upon as being properly admitted in evidence,—

The Court: You mean the Government's file?

Mr. Mulroy: The Government's file, which was in an envelope.

The Court: Do you want that offered in evidence?

Mr. Mulroy: I am willing to have it offered [27] in evidence.

Mr. Evans: I will offer it, Your Honor.

The Court: All right.

Mr. Franklin: I have never seen it, if Your Honor pleases.

Mr. Evans: I only offer it so far as the defense of the respondent, United States of America, is concerned.

The Court: I think counsel is entitled to look at it, especially in view of the position taken both by the Government and Mr. Mulroy, that there is liability attaching upon the Government only if there is inadequate insurance otherwise. That appears to be quite a long file. We might have a recess while you look through it.

Mr. Franklin: Thank you, Your Honor.

(Whereupon a short recess was taken.)

The Court: Have you finished reading the exhibit?

Mr. Franklin: Yes, and we have no objection, if Your Honor pleases, to the admission of that exhibit in evidence.

The Court: Very well.

(Government file marked Respondent Exhibit A-1 and received in evidence.)

Mr. Mulroy: If Your Honor please, the [28] clerk has called my attention to the fact that certain of the exhibits to be offered in evidence were actually not tendered or admitted.

The Clerk: Three and four.

Mr. Mulroy: Three and four. I offer Exhibits 3 and 4 in evidence.

The Court: They are admitted. All exhibits which have been offered are now admitted; so if there are any you forgot to name, we are covered.

(Documents previously marked Libellant's Exhibits 3 and 4 for identification received in evidence.)







RIIDE TO ARTICLES

THE AMERICAN MAIL LINE AGREES TO PAY AN AGENCY FEE BONUS TO THE CREW OF THE C.S. CASILLO, VOYAGE 6, IN ACCORDANCE WITH PROVISIONS CONTAINED IN THE APPLICABLE SUPPLEMENTARY AGREEMENTS IN EFFECT BETWEEN THE PACIFIC AMERICAN SHIPWOMEN'S ASSOCIATION AND THE VARIOUS MARINE UNIONS.

IN THE EVENT THE VESSEL AND/OR CREW BE INJURED, IMPRISONED, HOSPITALIZED OR PUT ASHORE DUE TO WAR CAUSES AND FOR THAT REASON, BE UNABLE TO CONTINUE THEIR VOYAGE, THE COMPANY AGREES TO PAY WAGES AND BONUS TO THE LATE MEMBERS OF THE CREW ARRIVE IN AN UNWELL STATES PORT, ON THE PACIFIC COAST: FURTHERMORE, THE COMPANY AGREES, IN SUCH EVENT, TO ARRANGE FOR REPARATION OF EACH MAN TO AN UNITED STATES PORT, ON THE PACIFIC COAST. ALSO, THAT THE COMPANY BE LIABLE FOR ANY INJURIES SUFFERED BY ANY CREW MEMBER DUE TO WAR CAUSES.

THE COMPANY AGREES TO REIMBURSE EACH MAN SO AFFECTED BY THE AMOUNT OF \$150.00 IN THE EVENT OF LOSS OF PERSONAL EFFECTS BY ANY MEMBER OF THE CREW DUE TO NECESSITY OF ABANDONING THE SHIP RESULTING FROM TORPEDOING, MINING, BOMBING, SINKING, SCUTTLING OR ANY OTHER WAR CAUSES, WHICH RESULTS IN THE SHIP WRECK OF THE VESSEL.

THE COMPANY ALSO AGREES TO CARRY WAR RISK INSURANCE IN THE AMOUNT OF \$2,000.00 FOR EACH MEMBER OF THE CREW, AGAINST LOSS OF LIFE AS A RESULT OF WAR CAUSES.

IT IS FURTHER AGREED THAT IN THE EVENT OF ANY INCREASE IN PAY, OR OTHER BENEFIT OR WAR BONUS, WHICH MAY BE GRANTED, AS THE RESULT OF NEGOTIATIONS BETWEEN THE UNION AND THE PACIFIC AMERICAN SHIPWOMEN'S ASSOCIATION, THE COMPANY WILL BE COVERED BY THE TERM AND EFFECTIVE DATE OF ANY AGREEMENT TO BE MADE.

*X.O. Dreyer*  
CASTER

*John D. Bunker*  
DEPUTY U.S. SHIPPING COMMISSIONER

November 28th  
Oscar Johnson Boatswain sent to

Hospital at Manila.

A. B.

Herman Cook promoted to Boatswain  
starting November 28th.

*X.O. Dreyer*  
*Castro*

Admitted August 16, 1960.





LIBELLANT'S EXHIBIT No. 4

Page 9

Official Log of the Capillo from Westport, Ore.,  
Towards Oriental Ports

Honolulu, Oct. 27

On arrival at Honolulu—vessel received orders from U. S. Navy Officials to proceed to Manila via Torres Strait and Malukka passage necessary charts were received for the intended voyage. Vessel also received fuel oil and fresh water, all tanks were filled to capacity.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

.....  
Chief Engineer.

Port Moresby, New Guinea, Nov. 17th

Upon arrival at Port Moresby it was found necessary to go alongside for fresh water (boiler) as a lot of condenser trouble had been experienced on the voyage from Honolulu to Port Moresby.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

.....  
Chief Engineer.

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Port Moresby, Nov. 17th

Oscar Johnson, boatswain, who had been sick several days, had Doctor attention at Port Moresby. Medicine was supplied.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

Manila, Nov. 28th

Oscar Johnson, boatswain, was taken to St. Pauls Hospital at this Port for treatment.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

Manila, Nov. 29th

Herman Cook, A. B., was this day promoted to Boatswain taking the place of Oscar Johnson.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

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Official Log of the S. S. Capillo  
Manila, Nov. 29th

Donald H. Buchalen, O. T., was this day promoted to Able Seaman.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

Manila, Jan. 4th, 1942, Noon

Dec. 29th the S. S. Capillo was heavily bombed. Caught fire in the after end of the vessel. At 1 p.m. vessel was abandoned. All members of the crew was landed at Corregidor Isl., where the vessel had been anchored 4 days.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

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Towards Santo Tomas Internment Camp

On Dec. 25th, 2:30 a.m. received orders from U. S. Navy Dept. to move the vessel to an anchorage at Fort Mills Corregidor. Left Manila Harbor at about 3:45 a.m.

Vessel was anchored at Corregidor as per Navy Orders.

Bombing raids over Corregidor every day.

Dec. 29th, 8:00 a.m., went ashore to find out from Navy authorities if they could advise a safer anchorage for the vessel.

NOTE: (The cargo was consigned to the Army and Navy.) I was told or advised to stay where

I was, as the vessel was under the protection of the Corregidor guns. Returned to the vessel at 11:50 a.m., at that time machinegun planes came over the vessel, and 3 heavy bombs hit the vessel aft, at # 4-5 hatches. Fire started immediately. Vessel was abandoned about 12:45 p.m.

/s/ C. A. LUNDQUIST,  
Chief Officer.

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Manila, Nov. 12th, 1942

Received a short censored note from Harold Rogers (messman) from Cabanatuan Military Camp, no other information.

/s/ K. O. DRYER,  
Master.

/s/ C. A. LUNDQUIST,  
Chief Officer.

Manila, Aug. 6th, 1943

Oscar E. Johnson, boatswain, who has been very sick, and in the Hospital since the vessel arrived at Manila, Nov. 28th, 1941, died Aug. 6th at 9:00 p.m. He had a bad hemorrhage. Johnson has a daughter, Betty Johnson, 8618-8th Ave., N.E., Seattle, Wash. He was cremated on Aug. 9th, 1943.

Witnesses:

/s/ CARL A. LUNDQUIST,  
Chief Officer.

/s/ P. B. NEUBAUER.

/s/ EVERETT S. S. CARP.

Mr. Mulroy: I file with the clerk certain stipu-

Oscar C. Johnson in account with J. V. Capella

J. J. Capella

MEMO ACCOUNT		CASH ACCOUNT
2 C. L. Engstrom	1 23	Osaka
1/10 W. S. Engstrom	44	Manila
1 P. S. Engstrom	25	—
3 C. L. Engstrom	2 23	—
2 C. L. Engstrom	44	—
2 C. L. Engstrom	1 20	—
2 C. L. Engstrom	60	—

I acknowledge having received the articles and cash as charged above.

WTN 188.

WITNESS:  
Jacob Holt K.O. Dreyer  
Master

Master

*in account with*

[illegible]

*I acknowledge having received the articles and cash as charged above.*

WITNESS.

WITNESS:  
 Walter Francis K. D. Greysen  
 Master.

*in account with*

[illegible]

I acknowledge having received the articles and cash as charred above.

**WITNESSES:**

Member.

Admitted August 15, 1950.





lations to the admission of these exhibits, if Your Honor please.

The Court: Very well, they may be filed.

Mr. Mulroy: And, if Your Honor please, I have consulted with counsel for both respondents and they have agreed that I may offer a further exhibit, being a letter of November 7th, 1946, from the War Shipping Board.

(Letter from United States Maritime Commission, New York, New York, to James G. Mulroy, Esq., 1410 Hoge Building, Seattle 4, Washington, marked Libellant's Exhibit No. 6 for identification and received in evidence.)

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LIBELLANT'S EXHIBIT No. 6

United States Maritime Commission  
New York, N. Y.

45 Broadway

November 7, 1946

Airmail

James G. Mulroy, Esquire  
1410 Hoge Building  
Seattle 4, Washington

Dear Mr. Mulroy:

Re: Mulroy v. Firemen's Fund Insurance  
Company and U. S. of America, No.  
14918  
SS Capillo

This will acknowledge receipt of your letter of  
November 1, 1946.

Our records do not contain any reference to the

above named seaman as a deceased former crew member of the SS Capillo. We are therefore unable to answer your questions specifically. Generally we may say that no beneficiaries were designated by crew members of the SS Capillo when signing on for her last voyage.

As you no doubt know this vessel was insured in the commercial market rather than by this office. Payment therefore, by U. S. Maritime Commission if made would be gratuitous and would be under the provisions of Public Law 17-78th Congress. In cases considered for payment under this law, when no beneficiary designations were found, payment has been authorized in some instances to next-of-kin, within the degree of relationship permitted by Article 7 of the Second Seamen's War Risk Policy, if it could be established that a bonafide case of dependency existed. Such payment was also contingent on definite declination of liability by the commercial underwriters.

We trust that the above will answer the questions you had in mind; however, if not please do not hesitate to communicate with us again.

Very truly yours,

W. H. CANTWELL,

Chief Adjuster,

Division of Insurance.

/s/ J. C. SIMPSON

By: R. F. MORROW,

Assistant Chief Adjuster.

Received by mail Nov. 13, 1946.

Admitted August 15, 1950.

Mr. Mulroy: This is offered by way of [29] showing that as of that date the War Shipping Administration had no record of the decedent, Oscar Carl Johnson, and that completes the proof for the libellant, if Your Honor please, and the libellant rests.

The Court: You may proceed.

Mr. Franklin: If Your Honor pleases, on behalf of respondent, Fireman's Fund Insurance Company, we move at this time that the libel be dismissed with prejudice, insofar as Fireman's Fund Insurance Company is concerned, upon the ground that the evidence tendered by the libellant fails to establish any cause of action against respondent, Fireman's Fund Insurance Company.

The burden of proof, of course, is upon the libellant to establish affirmatively that the death of the decedent occurred within the terms of the policy which Fireman's Fund Insurance Company admitted having issued in this particular case.

I do not propose at this particular time, unless the Court wishes, to argue the motion extensively other than to argue and call the Court's attention to the very basic fact that there is no evidence at all that the deceased, Johnson, died under circumstances which would bring him within the restricted terms of the war risk policy issued by Fireman's Fund Insurance Company.

This is not a general accident policy. This [88] is not a life insurance policy, but this is a war risk policy free of all other claims except those enumerated, and the enumerated hazards appearing in the insuring clause are those the result of capture,

seizure, destruction or damage by men of war, piracy, takings at sea, arrests, restraints and detentions and other warlike operations and acts of Kings, Princes and Peoples in prosecution of hostilities, whether before or after declaration of war, and so forth.

Now, the evidence affirmatively introduced by the libellant establishes that prior to the declaration of war, which occurred on December 7th, 1941, Pearl Harbor Day, the deceased, who was a boatswain on the vessel, had become sick and ill; that enroute from Honolulu to Port Moresby, New Guinea, his illness was such that he had to see a physician at Port Moresby; that when the vessel reached Manila on November 27th, 1941, long prior to any declaration of any war, the deceased was removed from the vessel because of illness, was sent to St. Paul's Hospital and remained continuously in Manila in various hospitals, never rejoining the ship, until his death from natural causes August the 7th, 1943.

This decedent was not even on the ship at the time it was subjected to the war risk for which this policy was issued, and the war risks which this policy covers are only war risks which affect a crew member because of the capture, the seizure, the destruction of the vessel. Here, [89] if Your Honor pleases, the evidence shows that this man was taken off the vessel prior to the time that any war risk hazard effecting the vessel covered by the policy occurred.

Your Honor will observe, when you have an opportunity of reading the Government's file, that the



War Shipping Administration agreed that there was no coverage under Fireman's Fund policy. That is why they agreed that under Public Law 17 they would then consider granting relief to the administrator of Johnson, and they did consider it, and they would have granted him relief but they found that the necessary dependency had not been proven by the daughter. That is the only ground on which the Government rejected the claim for second seaman's war risk.

The Court: Well, as I read the statute, it is necessary for a person to be covered by the Government policy to designate a beneficiary, unless there is found to be a ground of dependency. In other words, it does not seem to me, in reading the statute, to be strictly automatic.

Mr. Franklin: The point that I am making, if Your Honor please——

The Court: Do they by that policy—in other words, under 1128 it has to appear to the Commission that the insurance is adequate.

Mr. Franklin: 1128?

The Court: Well, 1128 of Title 46. [32]

“That insurance is inadequate for the needs of transportation in the water-borne commerce of the United States, and so forth, and cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a state of the United States”—that would appear to be a preliminary prerequisite before the attachment of Government insurance—“unless by the promulgation of this form of policy the commission



thereby made a determination that it appeared to the commission that insurance was inadequate and could not be obtained.

Mr. Franklin: Well, if Your Honor pleases——

The Court: And Article I, the persons insured.

“Any person or persons insured under any other or similar policy shall not to the extent of such prior coverage be entitled to coverage under this policy while such other insurance is in force and effect.”

Mr. Franklin: Yes.

The Court: Now, your insurance was in force and effect?

Mr. Franklin: It was in force. Let us put it that way.

The Court: Well, it was in force.

Mr. Franklin: But not in legal effect. Now, if Your Honor pleases, that situation——

The Court: Well, now just a moment. [33]

If it was in force and effect, it does not mean that it was in force and effect as to Oscar Carl Johnson.

Mr. Franklin: No.

The Court: It means it was in force and effect as to the members of the crew who were covered by it.

Mr. Franklin: Yes. That is right, Your Honor.

The Court: Your sole position is that Johnson was not covered by the insurance——

Mr. Franklin: Yes.

The Court: ——because he had left the boat and because he became ill from a natural cause rather than as a result of war.

Mr. Franklin: Yes. And, furthermore, that position received administrative approval from the War Shipping Board in the processing of Johnson's claim. As Your Honor will note from the file, there was some question raised initially by the War Shipping Administration as to whether this Fireman's Fund policy was not in effect and would preclude further consideration under Public Law 17 by the Administrator, and the War Shipping Administration resolved that question and held that the policy issued by Fireman's Fund did not cover Johnson, and then went a step further and considered whether Johnson was entitled to benefits under 1292, where the administrator is given that authority when he is not otherwise adequately provided for by insurance, [34] and they held that the beneficiary did not show dependency. For that ground only did the Government deny liability.

The Court: That question does not enter into your——

Mr. Franklin: Except as an administrative construction by the War Shipping Administration of the effect of the Fireman's Fund policy.

The Court: Yes. But I mean to say, whether or not Betty Lou Johnson, or whatever her name is, is a dependent——

Mr. Franklin: That does not enter into my situation.

The Court: Well, on your motion for a judgment at this stage of the game, all presumptions and inferences must be indulged against the maker of the motion.

Now, what evidence do I have here? I have the

log of the ship that on November 17th Oscar Johnson, boatswain, who had been sick several days, had a doctor at Port Moresby. Medicine was supplied. Then 11 days later, Manila, November 28th, Oscar Johnson, boatswain, was taken to St. Paul's Hospital in this port for treatment. Then—well, 10 months later, August 6th, Oscar Johnson, boatswain, who had been very sick, and in the hospital since the vessel arrived at Manila, November 28th, 1941, died August 6th at 9:00 p.m. He had a bad hemorrhage.

Mr. Franklin: Yes, Your Honor. [35]

The Court: And there is the doctor's statement that he did not have tuberculosis; that he had an abscess; that the doctor recommended——

Mr. Mulroy: A lobectomy.

The Court: In other words, cutting his ribs out.

Mr. Franklin: No, cutting open and draining the lung out. He had an abscess of the lung.

The Court: And there was no medical skill or facilities available for that purpose. This was recommended on or about March 3rd, which was six months before his death.

I think that at this stage of the proceedings I will have to indulge in inferences and presumptions against you and deny your motion.

Mr. Franklin: Well, I do not wish to belabor the point, but I wish to call the Court's attention to two things. First of all, that this man's illness has not resulted—there is no showing it resulted from any war risk hazard insured against; in other words, the risks insured against were not the proximate causes of this man's illness; therefore, the policy could not be effective.

Secondly there is no showing that the man did not receive proper medical treatment because of any of the risks insured against. Those risks are risks that are the result of damage to the vessel, if Your Honor pleases, something [36] involving the bombing or sinking or something of that sort. This man's illness developed naturally, and weeks before the bombing. The bombing had nothing to do with it. Therefor, if Your Honor pleases, we submit that the proximate cause of this man's illness is not shown to be the result of any risk insured against.

The Court: It is the proximate cause of his death with which we are here concerned, not his illness.

Mr. Franklin: That is true, but as I view the situation, he suffered from a progressive malady and the consequence of it is that he died. Now, the burden is upon counsel to show affirmatively, not by speculation or conjecture, but by probative evidence that the cause of this man's death was a risk insured against in our policy, and he has failed to do so.

The Court: Well maybe ultimately he will fail to do so, but at this stage of the proceeding I have got to indulge all the inferences and presumptions in his favor.

Your policy covers war risk—warlike operations. Certainly the bombing of the ship was a warlike operation, and his internment was a warlike operation. I have got to indulge the presumption that the ship being bombed could not go out, and he could not go out with it.



I have to indulge a presumption that on and after he was sent ashore, or interned, which was January 8th, [37] 1942, he was completely beyond his own control insofar as getting any medical attention is concerned; and, also, that within three months of that date—it was the only medical evidence that I had—a lobectomy would have been effective; in other words, would have prevented his death.

Mr. Franklin: Well, I am unable to concede that this medical report of Dr. Robinson is sufficiently definite or positive in terms to establish, as a matter of proof, that had this man had his lobectomy he would have recovered.

The Court: At this stage of the proceedings it is sufficient, when I have got to weigh all the scales against you and in favor of the libellant.

Mr. Evans: I should like to move at this time to challenge the sufficiency of the evidence likewise, Your Honor, on behalf of the United States of America. I would like to adopt the grounds stated by Mr. Franklin and in addition challenge the sufficiency of the evidence, first, as to any proof of authority of the libellant in this action to bring the action.

The libellant sues as administrator of the estate of Oscar Carl Johnson.

The Court: There are no certified copies of letters of administration.

Mr. Evans: Well, I believe the certified [38] copy of the order which has been introduced recites that such was.

The Court: Well, all right.

Mr. Evans: I am not disputing that he is the proper administrator, but I am disputing whether or not he has authority to bring this action.

There is set out in Paragraph II of the amended libel, the last part there of—it says:

“that this action is brought by him in the interest, behalf and for the exclusive benefit of the decedent’s said daughter and only child.”

I find no proof in the certified copy of the order which was introduced as Libellant’s Exhibit 5, or any other proof, that this action is brought exclusively for the daughter of the decedent.

(Argument of counsel for the United States of America in support of motion.)

The Court: The motion is denied.

It is now 12:00 o’clock. How long will you be with your evidence?

Mr. Franklin: If Your Honor pleases, I may have one or two witnesses. They will be quite short. I am quite sure it will not be over half an hour on direct, cross, redirect and recross.

The Court: Do you have some?

Mr. Evans: I haven’t got any witnesses, Your Honor.

The Court: You have not any witnesses. Well, I am frankly puzzled about just how far the United States is or is not in this case. I will think about it during the noon hour. We will recess until two o’clock.

(Thereupon, at 12:00 o’clock noon, court proceedings in the above entitled matter were recessed until 2:00 o’clock p.m. same day.) [40]



August 15, 1950, 2:00 o'clock P.M.

The Court: You may proceed.

Mr. Franklin: Respondent, Fireman's Fund, would like to call Dr. Slyfield.

FREDERICK SLYFIELD

called as a witness by and on behalf of respondent, Fireman's Fund Insurance Company, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. Frederick Slyfield.

Q. What is your calling?

The Court: Frederick what?

The Witness: Slyfield, S-l-y-f-i-e-l-d.

Q. (By Mr. Franklin): What is your calling?

A. Diseases of the heart and lungs.

Q. Are you a physician and surgeon?

A. Physician.

Q. How long have you been a physician?

A. Thirty years.

Q. What medical school or college are you a graduate of? [41]

A. The College of Medicine of the State University of Iowa, and of the Royal College of Surgeons, Edinburgh.

Q. I see. And following graduation did you specialize in any particular field?

A. Yes, sir. My work is limited to heart and lungs.

(Testimony of Frederick Slyfield.)

Q. How long have you limited your professional practice to that specialty?

A. Twenty-five years.

Q. And at the present time, Doctor, you are engaged in that practice in the City of Seattle?

A. I am.

Q. Are you connected with any institutions, patients suffering from lung conditions and diseases?

A. Yes, sir; I am Medical Director of the Laurel Beach Sanatorium.

Q. How many patients are currently treated at that institution?      A. One hundred.

Q. Doctor, did you ever know, to your knowledge, Oscar Carl Johnson, the deceased in this case?

A. I did not know him.

Q. Now, would you kindly examine Libellant's Exhibit 1, to which is attached a copy of a medical report by Dr. Robinson, and I will ask you if you have seen previously a copy of that report. [42]

A. I have. I went over the copy which you handed to me.

Q. Yes. And based upon the copy that you have of Dr. Robinson's report, can you reach a conclusion as to the precise cause of Mr. Johnson's death?

A. The cause of death was a pulmonary abscess—abscess of the lung.

Q. Now, will you advise us, Doctor, what is an abscess of the lung?

A. An abscess of the lung is a pocket of pus

(Testimony of Frederick Slyfield.)

which develops within the lung as a direct result of some infection other than tuberculosis.

Q. Is there anything in the report of Dr. Robinson which supplies the key to the source of the infection?      A. The source of the infection?

Q. Yes.      A. No.

Q. I see. Now, Doctor, have you had experience yourself treating patients with an abscess of the lung?      A. Yes, sir.

Q. Many times?      A. Many times.

Q. Now, referring, Doctor, to the treatment given for that condition between December of 1941 and August of 1943, what was—or what was the usual type of treatment given a [43] sufferer of a lung abscess?

A. Well, during that period, and for a far longer period, up until the time of penicillin, the treatment consisted either of medical or of surgical treatment.

Q. I see. Now, would you state what the medical treatment consisted of for that condition?

A. Well, it consisted largely of rest and general care; certain drugs we used, which were ineffective, and postural drainage; that is, we would have the patient lie in the position which he found he could best drain the abscess. He would bring up the pus more readily in certain positions.

Q. Doctor, what were the prognosis of successful treatment of a patient suffering from a lung abscess during the period mentioned by the methods you have just testified to?

(Testimony of Frederick Slyfield.)

A. It was recognized as an extremely hazardous condition, and I should say the results varied in different parts of the country, but it was around 75 per cent. I mean to say——

The Court: Fatal?

The Witness: 75 per cent of the lung abscess patients died.

Q. Now, was there a surgical approach to that condition in 1941 which was considered standard practice? A. There was.

Q. Will you state what that was? [44]

The Court: 1942, I think.

Mr. Franklin: I beg your pardon.

Q. (By Mr. Franklin): 1941, 1942 and up until August, 1943. A. It is the same today.

Q. I see.

A. The procedure consisted briefly of a two stage operation. It was necessary to open the chest between the ribs, sometimes taking out a section of a rib, and sewing the lung to the chest wall, and then a few days later going in, right into the lung abscess and inserting a rubber tube for adequate drainage.

Q. What are or were the results of that type of operation, Doctor, with reference to fatalities?

A. It was also very hazardous and it was assumed that the patient had about one chance in three of surviving.

Mr. Franklin: That is all. Thank you, Doctor.

The Court: You may cross-examine.

(Testimony of Frederick Slyfield.)

Cross-Examination

By Mr. Mulroy:

Q. Doctor, I did not clearly get your name. Would you mind spelling it for me?

A. S-l-y-f-i-e-l-d.

Q. Slyfield. [45]                      A. Right.

Mr. Mulroy: I should like to have that case history.

Mr. Franklin: I have got a copy of it here.

(Document in question presented to Mr. Mulroy.)

Q. (By Mr. Mulroy): Doctor—there is just only a small part of this case history that interests me. Did you ever hear of a Dr. Canizares?

A. I think not.

Q. He is described in this exhibit as the leading thoracic surgeon in the Philippines.

A. I noticed that.

Q. You read that?                      A. Yes.

Q. Will you tell me, is a thoracic surgeon the same sort of a professional man as you are?

A. No. He would be interested in the same things, but I am an internist.

Q. You are what?

A. I am an internist; that is to say, I don't do the surgery. I work out the case and determine what should be done and the surgeon does the mechanical end of it.

Q. So you are not a thoracic surgeon.

A. That is right.



(Testimony of Frederick Slyfield.)

The Court: In other words, your relationship to a patient would be similar to that of Dr. Robinson?

A. Yes, sir; that is right.

Q. (By Mr. Mulroy): Now, you testified that the operation spoken of here—that is a lobectomy, is it not, the operation you have described? That is a lobectomy, is it?

A. Lobectomy is mentioned here, yes.

Q. Well, is the operation you speak of——

A. No, that is a different procedure.

Q. That is a different procedure?

A. That is right.

Q. Then you have not testified as to a lobectomy, have you?      A. That's right.

Q. The operation which you have described, you say it is a very hazardous undertaking and that there is a 66 and two-thirds chance against the patient living. Do you mean by that that two-thirds of them will perish on the operating table or shortly thereafter, or will they live several years and then die of the results of the operation?

A. If the record shows that statement, I think I got it turned around. What I should have said, and what I meant to say, and what the fact is, that about 33 and a third per cent of those patients, prior to the advent of penicillin, have died; 33 and one-third per cent of the surgical cases have died.

Q. Prior to penicillin?      A. Right.

The Court: Then the chance of living with such an operation was three to one—two to one.

The Witness: Two to one.



(Testimony of Frederick Slyfield.)

Q. (By Mr. Mulroy): I think you testified also, although I must say I did not clearly hear you at first until I changed my position, I think you testified as to when the administration of penicillin came into general use. When was that?

A. Oh, that was about 1943, I think.

Q. Do you remember about what date it was in 1943?

A. No.

Q. You would not say the first part of 1943?

A. No; I couldn't even be sure of the year. I know we used it as early as possible, but I have forgotten exactly when it was.

Q. You used it yourself?

A. I have.

Q. Penicillin is administered how?

A. By intramuscular injection. It is shot into the muscle with a syringe.

Q. The upper part of the leg?

A. Usually in the buttock, but it doesn't matter where you put it. [48]

Q. And that is an injection?

A. Right.

Q. You were using that in 1943, were you?

A. As I say, I am not quite sure when we began its use, but it was being used sometime in 1943.

Q. It was available in the United States in 1943?

A. Yes, sir.

Q. That is, generally available in hospitals and to medical practitioners?

A. I am not sure about the time.

The Court: It was not as plentiful as now?

The Witness: No. It was seven dollars and a half a vial.

(Testimony of Frederick Slyfield.)

The Court: Do you have any knowledge as to whether or not it was available through—available to somebody interned in the Philippines?

The Witness: I wouldn't know.

The Court: You would not know?

The Witness: No.

Mr. Mulroy: That is all, Doctor.

Mr. Evans: I just have one question, I believe.

Q. (By Mr. Evans): Doctor, I believe you described an operation which you did not give a name to, at least if the name was given to it I do not recall what it was. Does that operation have a [49] name, the one which you have described?

A. Well, no, I think not, but it would be spoken of as a rib resection and then putting a tube into the abscess.

Q. Now, a lobectomy is referred to in the report which has been shown to you as one of the exhibits in this case. Can you advise us as to the difference between a lobectomy and the operation which you have described?

Mr. Mulroy: If Your Honor please, I think it is proper to object to that question inasmuch as the doctor has testified that he is not a surgeon and, also, that there was not a lobectomy—he did not testify as to a lobectomy.

The Court: Objection overruled. This is cross-examination, and it is not his witness.

A. There is practically no similarity.

Mr. Mulroy: This is direct—redirect, if anything.

(Testimony of Frederick Slyfield.)

The Court: This is not the Government's witness.

Mr. Mulroy: Very well.

The Court: Tell us what a lobectomy is, if you know.

The Witness: The right lung has three lobes. A lobectomy consists of the acquisition, the cutting out of one of the lobes. Obviously in this case it would be the right lower lobe. That is where the abscess was. [50]

Q. (By Mr. Evans): As I understand that, that lobe, then, is removed entirely from the body?

A. That is right.

Q. Can you give us any information as to the chances of recovery from such an operation?

A. I think the patient would most certainly have died very shortly because in a lobectomy, after the abscess has continued for a time, you almost always get an infection of the lower space in which the lung lies, and that calls for resection and the tube into the empyema space; and there is terrific toxemia, and usually the patient doesn't survive very long.

Q. Now, you previously gave us some estimates as to the chances of recovery on the operation which you previously mentioned. Do you have any information as to figures of a similar type on a lobectomy?

A. I have not—I have no statistics, sir, but I have seen a lot of it and my impression is that in a case like this a lobectomy would have hastened the

(Testimony of Frederick Slyfield.)

man's death because of the wide-spread and terrific infection associated with a lung abscess.

The Court: It would depend upon the stage at which the lobectomy was performed, would it not?

The Witness: That would be a factor.

The Court: Of course, this man died in August. If a lobectomy were performed as early as March, would that have made a difference?

The Witness: Possibly. But in any case, the important fact is that a lung abscess is present, and when you have a lung abscess, it is one of the worst things we have to deal with. You have to cut through infection to remove a lobe, and when you cut through an infected area, everything in the neighborhood is promptly infected and the situation is often much worse, and many a surgeon has wished he had never seen the case.

The Court: You said that an abscess was caused by some infection other than tuberculosis. That might be the after effect of a cold?

The Witness: Yes, sir.

The Court: Pneumonia?

The Witness: Right.

The Court: And foreign substances in the lung?

The Witness: Inhaled, yes.

The Court: Inhaled?

The Witness: Yes.

Q. (By Mr. Evans): Doctor, I see in the report a statement about bronchial asthma. Would a patient who was suffering from such an affliction be more or less likely to recover from a lobectomy, or

(Testimony of Frederick Slyfield.)

would it have any effect on his chances of recovery at all? [52]

A. You mean the presence of bronchial asthma?

Q. Yes.

A. That was an error in diagnosis. That is quite clear as you study the case.

Q. I see. From a review of the exhibit which is before you, I believe, would you in your professional judgment have recommended a lobectomy at any time during the periods mentioned there, or do you have sufficient information from that report to make such a statement?

A. As I study the case, I feel I would have advised against it.

Mr. Evans: I see. I have no further questions.

The Court: As I understand your position, you would never recommend a lobectomy for an abscess?

The Witness: For an abscess, that is right. We recommend it in tuberculosis sometimes.

The Court: Is that all?

Mr. Franklin: Yes. May the Doctor be excused?

The Court: As far as I am concerned, yes.

(Witness excused.)

Mr. Franklin: The respondent, Fireman's Fund, desires to call Captain Dreyer. [53]

### K. O. DREYER

called as a witness by and on behalf of the respondent, Fireman's Fund Insurance Company, being first duly sworn, was examined and testified as follows:



(Testimony of K. O. Dreyer.)

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. Dreyer, initials K. O.

Q. What has been your calling?

The Court: Oh, your last name is Dreyer?

The Witness: That is right.

The Court: And your first initial is "K"?

The Witness: K. O. Carl Olaf, that is my name.

The Court: Carl Olaf?

The Witness: That is right.

Q. (By Mr. Franklin): What has been your occupation? A. I am a seafaring man.

Q. Have you been a master?

A. I have held a master's license since 1923.

Q. Are you sailing at the present time, Captain?

A. No, sir.

Q. Have you sailed since you were evacuated from the prison camp in Manila?

A. I made one trip in 1946. [54]

Q. Captain, in October, 1941, to what vessel were you attached? A. To the steamer Capillo.

Q. In what capacity? A. Master.

Q. Whom was the vessel being operated by?

A. American Mail Line.

Q. Did you leave on a trip, Captain, which you thought was for Shanghai? A. Yes, sir.

Q. About when and where did you leave the Pacific Northwest? A. When and where?

Q. Yes, approximately.



(Testimony of K. O. Dreyer.)

A. We left on the 18th of October, 1941, from Astoria, Oregon.

Q. Who was the boatswain aboard the vessel?

A. Oscar Johnson.

Q. Now, had Oscar Johnson sailed with you previously on some other ships?

A. He sailed with me in 1938 on a Weyerhaeuser ship. I was Chief Officer at that time and he was a sailor at that time.

Q. Now, Captain, where did the vessel go from Grays Harbor? What was its next port of call?

A. We left originally from Westport.

Q. Oh, Westport, Oregon.

A. And we stopped at Astoria, where we received orders to proceed to Honolulu and sail to Shanghai.

Q. I see. Now, did you stop at Honolulu, Captain?

A. Yes, sir.

Q. Then what was your next port of call?

A. Port Moresby, New Guinea.

Q. Did anything happen to the health of the boatswain, Mr. Johnson, from the time the vessel left Honolulu until it reached Port Moresby?

A. Yes. About three or four days out, I couldn't tell you exactly, he took very sick and could not work any more, and he was hospitalized. We put him in the hospital that was on the ship.

Q. In the ship's hospital?

A. Yes.

Q. Now, Captain, what were his symptoms of illness that you saw?

(Testimony of K. O. Dreyer.)

A. Well, heavy coughing, and spitting blood, and so on.

Q. What happened to his condition as you approached Port Moresby? Did it improve or not?

A. No, he was getting worse and worse. We came to Port Moresby. We were really not supposed to stop at Port Moresby. [56]

Q. May I ask you, Captain, where is Port Moresby located?

A. In the southern part of New Guinea.

Q. Well, was your stop at that port made necessary by Mr. Johnson's illness?

A. Not entirely by Mr. Johnson's illness, because the engineer needed water, and putting the two things together, I thought it was a good opportunity to go in there and have him taken care of.

Q. Did the doctor come on the vessel or did Mr. Johnson go ashore?

A. No, the doctor came on the vessel.

Q. Was Mr. Johnson at that time in condition, do you think, to have gone ashore for medical treatment?

A. He should have gone there, but the doctor advised me that it was not the proper place for me to send him to a hospital because he had no facilities with which to take care of him.

Q. Physically, Captain, was Mr. Johnson able to have gone ashore and visited the doctor at his office in Port Moresby, or was his physical condition such that the doctor had to come aboard?

A. The doctor had to come aboard; and if he

(Testimony of K. O. Dreyer.)

had gone ashore, we would have had to carry him ashore.

Q. Now, did you receive any instructions from the doctor [57] in Port Moresby as to what kind of treatment Mr. Johnson needed at that time?

A. No, but he told me the best he could do was give me some medicine which consisted of some pills and, so far as I remember, some powders to be taken in water, and that would relieve his pain and coughing, and probably he would be better off to stay on the ship until we arrived in Manila where he could get proper hospital care.

Q. Captain, about what was your running time from Port Moresby to Manila? A. Ten days.

Q. During that 10 days what was Mr. Johnson's physical condition?

A. He was fairly good the first three days, but then he started back again, started to cough heavily, and usually—not exactly blood. There was blood in the spit. And my opinion about him, he was in such a condition that if the ship had been on the trip four or five days longer he would have been buried at sea. He was in very bad condition.

The Court: Did he have a fever?

The Witness: Yes, sir, he had fever. We took his temperature at times there.

The Court: You took his temperature?

The Witness: Yes, sir.

The Court: What was it? [58]

The Witness: Well, about a hundred or a hundred and one at times.

(Testimony of K. O. Dreyer.)

Q. (By Mr. Franklin): In view of his critical condition, what did you do with reference to obtaining medical treatment for him as soon as the vessel reached Manila?

A. Well, I broke one of the regulations. I was not supposed to send out any radio messages, but I wired into Manila to the Company's agent, to have the doctor ready on our arrival, and then when we arrived there the doctor's boat was alongside immediately and he was taken ashore.

Q. When was that Captain; what date?

A. The 28th of November.

Q. Where was Mr. Johnson taken, if you know?

A. Lazaro, or some name.

Q. The log entry shows St. Paul's Hospital.

A. Well, I am telling you, I am not sure whether it was St. Lazaro's or St. Paul's.

Q. I see. Now, did Mr. Johnson do any work on the ship at any time from the time the vessel left Port Moresby up until the time he was taken off at Manila?

A. No. He was not out of his room.

Q. After Mr. Johnson left the Capillo, did you reappoint somebody else as boatswain?

A. Yes, sir.

Q. Now, did Mr. Johnson at any time after November 27th, [59] 1941, rejoin the Capillo?

A. No.

Q. Was Mr. Johnson aboard the vessel at the time the Capillo was bombed by the Japanese?

A. No.

Q. December the 27th?

A. The 29th.

(Testimony of K. O. Dreyer.)

Q. December 29th, 1941?

A. No, he wasn't.

Q. You were aboard the vessel at that time, were you, Captain? A. Yes.

Q. And as a result of that, was the ship destroyed by bombing?

A. Not exactly destroyed. She took fire.

Q. I see. And then what happened to you and the various members of the crew?

A. Well, we left the ship and landed at Corregidor, and we stayed there until December the 31st, when we managed to get transportation into Manila on a tow boat.

Q. Captain, where was the vessel at the time of the bombing? Was it lying in Corregidor?

A. At Corregidor.

Q. How far is that from the harbor or the City or Manila? A. About 26 or 27 miles. [60]

Mr. Franklin: That is all. Thank you, Captain. These other gentlemen will ask you some questions.

The Court: Do you wish to adopt him as your witness on direct?

Mr. Evans: May I wait until after the cross-examination to decide that?

The Court: No, I think you had better make up your mind now and then counsel can examine on both of your direct——

Mr. Evans: I will adopt this witness as my witness, and I would like to adopt the testimony that has been given. I have no further direct.



(Testimony of K. O. Dreyer.)

The Court: Very well, you may cross-examine.

Cross-Examination

By Mr. Mulroy:

Q. You testified, Captain Dreyer, that Mr. Johnson sailed with you on other trips?

A. It was on another ship.

Q. On another ship? A. Yes.

Q. What was his position on the other ship?

A. Seaman.

Q. Did he appear at that time to be healthy or not?

A. Well, Mr. Johnson never looked very healthy at any time. [61]

Q. He did all his work as a seaman?

A. Oh, yes.

Q. And he did all his work as a boatswain up to the time he got sick, is that right?

A. That is right.

Mr. Mulroy: That is all, Captain.

Mr. Franklin: May the Captain be excused?

The Court: Yes. Were you interned in the same camp with Mr. Johnson?

The Witness: Yes, sir.

The Court: Did you see him while you were there?

The Witness: Yes, sir. The last time I saw him was in May, 1943, when I was removed from that camp and sent to another camp.

The Court: Did he have medical attention there?

The Witness: In the hospital?—In the camp?

The Court: In the camp.



(Testimony of K. O. Dreyer.)

The Witness: He had as much medical attention as he probably could get under the circumstances.

The Court: Well, what was it?

The Witness: Well, it was not what I would call the best.

The Court: What kind of food was there?

The Witness: Well, it was not the best, either.

The Court: Well, what was it? What did he have to eat and you have to eat?

The Witness: Well, mostly rice and beans and very, very little meat.

The Court: Did you lose weight?

The Witness: I did.

The Court: How much did you lose?

The Witness: Well, from 180 to 121.

The Court: 180 to 121?

The Witness: That is right.

The Court: Did Mr. Johnson lose weight?

The Witness: He did.

The Court: Do you know how much he lost?

The Witness: I don't know.

The Court: Did all the men lose weight?

The Witness: Everybody lost weight.

The Court: Everybody lost weight?

The Witness: Yes.

The Court: What was the medical attention; Japanese doctors?

The Witness: No.

The Court: Filipino doctors?

The Witness: No, we had our own doctors. This Dr. Robinson was a missionary doctor.

(Testimony of K. O. Dreyer.)

The Court: Missionary? [63]

The Witness: Yes. And he was also interned.

The Court: Well, how many sick people did he have to take care of?

The Witness: Oh, quite a few, but there were two or three other doctors in camp that helped him out. But Dr. Robinson was the leading man.

The Court: How many people were interned there altogether?

The Witness: At that time when I was there about three thousand.

The Court: Three thousand?

The Witness: Three thousand.

The Court: You had several other members of your crew there, didn't you?

The Witness: All of them except four or five, I think it was.

The Court: All of the crew died there?

The Witness: No, five altogether.

The Court: Five died there altogether?

The Witness: Yes.

The Court: They lost weight, did they?

The Witness: Oh, yes.

The Court: Dysentery?

The Witness: Dysentery—well, what I call malnutrition. [64]

The Court: Malnutrition?

The Witness: Yes.

The Court: Was Mr. Johnson a big eater?

The Witness: I don't know.

The Court: Well, I mean when he was on the boat.

(Testimony of K. O. Dreyer.)

The Witness: I—I was sitting down eating with him, but I never noticed.

The Court: You had good food on the boat?

The Witness: Oh, yes; the best.

The Court: You say he had a fever all the time?

The Witness: At that time he had—when he was sick.

The Court: That is when he took sick out of Honolulu?

The Witness: That is right. We were not professional doctors, but we treated him the best we could.

The Court: You treated him as if it were a cold?

The Witness: Yes. We gave him some tablets, and whether we did right or wrong I couldn't tell you, because we were not doctors and we really didn't know what was wrong with the man. And he never told any of us until later about this. When it was time for me to leave Santo Tomas Camp, I spoke to Dr. Robinson, and Mr. Johnson at that time had told [65] Dr. Robinson that years ago he had worked in some mine, or digging a tunnel, and the dust had settled on his lungs. But he never told me or any of his shipmates what was wrong with him.

The Court: Well, on this previous voyage, how long was that before this one?

The Witness: That was in 1938.

The Court: 1938?

The Witness: Yes, sir.

(Testimony of K. O. Dreyer.)

The Court: Was he sick then?

The Witness: Well, he was sick. Of course, it was on a coastal ship and Mr. Johnson—I don't know what was wrong with him, and in a case like that, when a seaman gets sick, he just comes up and asks for a hospital certificate and goes up to the Marine Hospital, and that is what he did in Baltimore in 1938.

The Court: You did not know what was wrong with him?

The Witness: At that time I didn't.

The Court: It might have been the flu.

The Witness: I don't know. We lived pretty good on merchant ships.

The Court: I see. I do not think I have any other questions. The witness may be excused.

Mr. Evans: Your Honor, in view of the additional [66] phases that have been opened up by the Court's questions, I would like to have the opportunity to further question this witness.

The Court: All right.

I think I would like to have Dr. Slyfield back or are you going to have another doctor?

Mr. Franklin: No, I did not plan to.

The Court: I just noticed that the onset of this was on, say, about November 1st, 1941, and he lived for 23 months.

All right, go ahead, Mr. Evans.

### Redirect Examination

By Mr. Evans:

Q. Captain, as I understand, you were interned by the Japanese about what date?

(Testimony of K. O. Dreyer.)

A. I, myself, was interned on January the 9th. The rest of the crew were interned on January the 6th, 1942.

Q. Now, by the rest of the crew are you including Mr. Johnson in that, too?

A. No. Johnson was—was—he had been in the hospital, and when I came into Manila from Corregidor on December 21st, the Company's agents—he was ordered to the hospital and the Company's agents had sent him to the Oriental Hospital, where I saw him, and at that time he looked pretty [67] good. But then on January the 6th the Japs put us all—put all the crew in the concentration camp, Johnson included.

The Court: You say he looked pretty good?

The Witness: Yes.

The Court: You mean he was sitting up?

The Witness: Sure.

The Court: Walking around?

The Witness: That is right.

The Court: He was not bed ridden?

The Witness: No. That was on the 31st of December.

The Court: The 31st of December?

The Witness: The 31st, or the 1st of January.

Q. (By Mr. Evans): Now, at the time you were interned, and particularly referring to Mr. Johnson, you were not in the Death March and put in the same concentration camp as the prisoners taken by the Japanese in Corregidor, were you?



(Testimony of K. O. Dreyer.)

A. No.

Q. You were separate and apart from that group?

A. Yes. We were treated as civilian personnel.

Q. Do you recall what agency or department of the Japanese Government had charge of your prison camp?

A. Well, it was civilian Japanese in the first year I was in there that had charge of the camp. I haven't got the names of any of them. [68]

Q. During that period of time did you lose any weight?

A. Oh, yes; not too bad, though, because the first year in there the food was fairly good, but after a year or so the military took it over and they cut out everything.

Q. Well, up until the time that the military took over, were you allowed to buy certain fresh fruits and vegetables from the natives?

A. Yes. The natives were allowed in camp, but after the military took it over, they were not allowed in.

Q. Now, do you recall when the military took over?

A. Well, it was before May, 1943, anyway.

Q. You were removed from the camp where Mr. Johnson died at some time?

A. May 16th I was moved to a camp they called Los Bamos.

Q. May 16?            A. Yes.

Q. Now, the military had taken over before that?            A. Yes.



(Testimony of K. O. Dreyer.)

Q. Then, as I understand, you were not in the same camp with Mr. Johnson at the time he died?

A. No, but my chief officer was there and the Company's agent.

Q. Now, I don't suppose you know how much weight you lost up until the time the military took over?

A. No, I couldn't tell you exactly. [69]

Q. But the conditions during that period of time, as I understand it, were not too bad.

A. Not too bad. The first year was not too bad, when you consider yourself a prisoner of war.

Mr. Evans: That is all.

Mr. Mulroy: I have nothing further.

The Court: Any redirect?

Mr. Franklin: No redirect.

The Court: The witness may be excused. Call your next witness.

Mr. Franklin: The respondent, Fireman's Fund Insurance Company, rests its case. I notice that Your Honor mentioned about having Dr. Slyfield available. He has gone back to his office, I assume, and I can ask my associate, Mr. Holland, to call him up and try and get him back. I do not know whether he will cooperate.

The Court: Well, the only thing I had in mind was to see whether or not his opinion—he did not express it in connection with the severity of this abscess, the onset, which was, as I say, on or about November 1st, 1941, and the man lived for 22 months afterward.

(Testimony of K. O. Dreyer.)

Mr. Franklin: Do you think the evidence warrants that inference as to when the abscess developed? The evidence is that he became ill and sometime before his death he did develop a lung abscess, but not that he had a lung abscess [70] at the time the vessel——

The Court: Is the inference warranted that he developed a lung abscess after internment?

Mr. Franklin: No, I couldn't say that.

I think we will attempt to recall Dr. Slyfield.

The Court: It is up to you. I don't care.

Mr. Evans: I would like very much to have him recalled, Your Honor.

The Court: Well, then, we will have—do you have any other witnesses?

Mr. Franklin: I have no further witnesses. We will rest our case, unless we can get Dr. Slyfield here.

The Court: All right, then, we will have a recess and you will see if you can get him here.

(Whereupon, a recess was taken.)

Mr. Franklin: May we recall Dr. Slyfield?

### FREDERICK SLYFIELD

a previous witness in behalf of the respondent, Fireman's Fund Insurance Company, and having been duly sworn, was recalled and testified further as follows:

#### Redirect Examination

By Mr. Franklin:

Q. Doctor, it has been testified by the master of

(Testimony of Frederick Slyfield.)

the vessel, Captain Dreyer, that Mr. Johnson became ill between the time the vessel left Honolulu—I do not have the exact [71] date—and some 10 days later when the vessel reached Port Moresby; that during this 10-day interval he was feverish; had a temperature of around 102; that he was coughing and spitting blood; that he was seen by a physician in Port Moresby who suggested he should be hospitalized as soon as possible; there being no facilities at Port Moresby, the vessel continued on to Manila, reaching Manila November 27th, 1941, where Mr. Johnson was immediately taken off the ship and transferred to St. Paul's Hospital where he remained until sometime before—about January the 1st of 1942, at which time he was seen by Captain Dreyer who had observed that he was walking around and felt and looked much better. Now, assuming those facts to be true, Doctor, and basing your answer upon the report of Dr. Robinson as to the subsequent history in the case, I will ask you if you can form any opinion as to when the lung abscess from which Mr. Johnson died first developed.

A. We have to determine that, Mr. Franklin, on the basis of the record of the symptoms.

Q. Yes.

A. Knowing subsequently that the man had a lung abscess, certainly we should date it back to the beginning of the symptoms.

Q. And that would be when, Doctor?

(Testimony of Frederick Slyfield.)

A. November, on the ship, when he had fever and coughing and spitting of blood. [72]

Q. Now, Doctor, are there periods when the patient will have a remission of symptoms?

A. That is the usual thing. A lung abscess is a pocket of pus. Eventually the abscess bursts into the bronchus and drains, and for a time that is the same as putting a tube into the abscess. You get good drainage. And so long as you have good drainage the patient may feel reasonably well, but it will fill up again.

Q. I see. Doctor, is there anything unusual in the fact that Mr. Johnson developed a lung abscess, we will say, in November of 1941 and lived until August of 1943?

A. Nothing unusual, no, sir. If there is good bronchial drainage, that is, if a man can cough up the pus, he may live for a considerable period of time—sometimes years.

The Court: Would malnutrition have anything to do with his resistance to the course of the disease?

The Witness: Well, I think it would be a very minor factor.

The Court: Well, assume that he was interned in Santo Tomas Camp from January 1st, 1942, until the date of his death in August, 1943, and that during that entire period of time other men lost as much as 60 pounds due to lack of proper nutrition, and that Mr. Johnson had the same kind of food. Would that make any difference? [73]

(Testimony of Frederick Slyfield.)

A. The answer seems obvious, Your Honor, but I think it would be a minor factor because you have to deal with a very serious infection and unless that infection can be conquered you are not going to get anywhere with any amount of food.

The Court: Well, does malnutrition affect any disease?

The Witness: Not necessarily. Of course, if a man starves to the point of complete exhaustion, presumably he would die sooner of that infection, whatever it might be. But as I read the excellent resume of the situation by Dr. Robinson, my impression was that this man complained of food only in one camp where he lived for a matter of a few days and asked to be transferred back to where he had been and where the food was better. That is my impression.

The Court: Now, in the outline as given to you by Mr. Franklin, assume that this was first diagnosed as a lung abscess in August, 1942, but a year before he died and almost a year after the onset of the disease; would that make any difference in your conclusion?

The Witness: No, sir.

The Court: Your opinion would be that he still had the lung abscess in November, 1941?

The Witness: Yes, sir. A hemorrhage of the lungs is due to very few things. An automobile accident, [74] fractured ribs, will do it. He didn't have that. Cancer of the lungs will do it. He didn't have that. Bronchiectasis, that was ruled out. Tuberculosis will do it. That was ruled out.



(Testimony of Frederick Slyfield.)

The Court: Pneumonia?

The Witness: I beg your pardon?

The Court: Pneumonia?

The Witness: Usually not. You get a rusty sputum. But as I understand, this man spit up blood. That means lung abscess.

The Court: Cross-examination?

Mr. Mulroy: No cross-examination.

The Court: Do you have any further questions?

Mr. Evans: No, I have no further questions.

The Court: All right, I guess this time you may be excused. Thank you for coming back again, Doctor.

Mr. Franklin: The respondent, Fireman's Fund, rests.

Mr. Evans: The Government rests, Your Honor.

The Court: Any rebuttal?

Mr. Mulroy: I have no rebuttal, if Your Honor please.

The Court: The plaintiff rests?

Mr. Mulroy: The plaintiff rests. [75]

(Arguments were then made by counsel for the respective parties.)

### COURT'S ORAL DECISION

The Court: Judgment will be for the libelant against the Fireman's Fund.

On the Government end of it, I do not go along with the construction made by the Maritime Commission that the matter of dependency is the stand-



ard which determines their liability at all. But I do not find any statement before me, nor has any been called to my attention, of which I can take judicial notice, which would bring this case within the provisions of Section 1128 of Title 46; that is to say, that it appeared to the Commission that the insurance was adequate for the needs of transportation—in other words, that they had not made any finding that insurance was inadequate or cannot be obtained on reasonable terms and conditions. The insurance went into effect on the date of the policy, and it would have to be that date, that is to say, October 17, 1941, that the Commission would have had to make such a finding; so [76] I think the libelant is not entitled to judgment against the Government for that reason.

Now, whether or not Fireman's Fund has an action over, or against the Government on account of some contract, or because of some finding which they have made and which is not before me now, I cannot say. But the judgment will be for the libelant against the Fireman's Fund in the principal sum of the policy, five thousand dollars, and it will be against the libelant and for the Government on the claim of the libelant for relief, if any is set forth in the libelant's complaint.

Mr. Franklin: There will be no interest allowance, will there, if Your Honor please? This matter was held up for several years because of Mr. Mulroy's absence in Germany.

The Court: I think there ought to be an interest allowance from the date of judgment.

Mr. Mulroy: If Your Honor please, if there is a disallowance of interest due to my absence in Germany, that is decidedly improper because at all times I have been represented here and all of the delay in this case has been due to the Government having different exceptions which were never brought up for hearing, although I was always willing to have them heard. Any delay was due to waiting on administrative processes at the request of the Government.

The Court: What is the legal rate of interest in Washington?

Mr. Mulroy: Six per cent, if Your Honor please.

The Court: When was this filed?

Mr. Mulroy: This was filed in——

The Court: 1946?

Mr. Mulroy: 1946. I think it was in April of 1946.

The Court: Well, in any event, I do not think you should have interest prior to the date of filing your suit.

Mr. Mulroy: Very well, Your Honor.

The Court: So interest will be from the date of filing suit, April 12th, 1946.

Mr. Franklin: May I be heard, if Your Honor please?

The Court: Are you going to talk me out of it again?

Mr. Franklin: No, but I feel that a very substantial injustice is being done in allowing that interest against Fireman's Fund. We have been ready at all times to try this. Mr. Mulroy was in

Europe. I am prepared to testify, and my file will show, that on numerous occasion I tried to get the case set. Mr. Mulroy was in Europe. He had Mr. Jarvis here who said, "Please wait until Mr. Mulroy comes back." And under those circumstances, if Your Honor please, [78] I think it is a substantial injustice to assess interest against me.

Mr. Mulroy says the delay was due to the Government, yet Your Honor awarded the interest against us. I think it is highly inequitable to award interest against us at any time prior to the date of judgment. We have been ready and willing at all times to try this case.

The Court: Well, I will tell you what perhaps I had better do is to refrain from making any order in the matter of interest at this time. I am, of course, not familiar with this calendar here. Judge Bowen is. I will consult with him as to the approximate date this case could have been tried, and if it appears that it was delayed due to either party's fault, I will take that into consideration in determining whether or not I shall allow interest or shall not allow interest.

Mr. Franklin: Well, if Your Honor wants a showing under oath, I would like to testify, because I have been intimately associated with the case; that I have been anxious at all times to get the matter disposed of; and that insofar as Mr. Mulroy's relations with the Government are concerned, I have no knowledge or information, but I have been ready and the reason the case was not tried was because Mr. Mulroy was in Europe for three years.

Mr. Mulroy: I wish to say something in regard to that, if Your Honor please. This case was filed in April of 1946, and I left for Germany in June of 1947, and in the course of that time the Government had filed exceptions. Those exceptions I was at all times ready to argue, and I consulted Mr. Pellegrini about it. Those exceptions have since been withdrawn. They had no merit. They had no merit then, now, or at any time, and the delay—I agree with Mr. Franklin, to the extent that he was ready to try and I was ready to try, but it was held up pending an administrative settlement; and, as a matter of fact——

The Court: Who sought the administrative settlement? You?

Mr. Mulroy: I did not, no. Mr. Pellegrini suggested it.

The Court: Who is he? I do not know him.

Mr. Mulroy: He was representing the Government.

Mr. Evans: He was my predecessor, Your Honor.

The Court: Oh.

Mr. Mulroy: And, as as matter of fact, if Your Honor please, there was never any answer filed by the Government.

The Court: On the matter of exceptions to libel, they can be brought on for argument at any time, counsel.

Mr. Mulroy: The case was not at issue, if Your Honor please. [80]

The Court: No, but if they file exceptions, you

dispose of them. You do not have to wait four years to dispose of exceptions to a libel.

Mr. Mulroy: I have always been ready to dispose of them.

The Court: When they were disposed of, then the matter could have been put at issue. When was it finally at issue?

Mr. Mulroy: I cannot give you the exact date, if Your Honor please, but the record will show there.

Mr. Evans: Sometime in June, 1949.

Mr. Mulroy: It was not actually at issue until June of 1949, Your Honor.

The Court: Well, the Government's answer is filed June 27th, 1949, the answer to the amended libel.

When was the case set for today?

Mr. Mulroy: About two months ago, if Your Honor please.

If Your Honor please, this case could have been heard before I went to Germany, but it was never brought to issue.

The Court: Mr. Franklin, suppose you make your showing on the matter of delay.

Mr. Franklin: Yes.

The Court: I do not think you need to be sworn. [81] You are a member of the bar here, and I presume that members of the bar tell the truth until I find out to the contrary.

Mr. Franklin: If Your Honor please, I am associated with the firm of Bogle, Bogle and Gates, attorneys for Fireman's Fund Insurance Company.



The libel was served upon us in this case and we filed our appearance on the 20th day of April, 1946; that we were at all times ready to proceed to trial thereafter; that we had, of course, nothing to do with the relations between the administrator and his efforts against the United States of America; that this case was originally set for trial in 1946, I believe, or July 8th, 1947, before visiting Judge Foley of Phoenix, Arizona.

The Court: Foley of Nevada.

Mr. Franklin: Nevada, yes. But upon the statement of Mr. Pellegrini, then representing the Government, that the matter was being administratively considered, that setting was vacated; that thereafter the writer attempted on numerous occasions to get a date for the trial of the case; that the matter was referred, in Mr. Mulroy's absence, to a Mr. Jarvis; that the writer held numerous conferences with Mr. Jarvis, at which time Mr. Jarvis advised that the matter be held in abeyance pending the expected return of Mr. Mulroy to this country, and that the respondent, Fireman's Fund, has been ready and willing at all times to litigate this case from the time the matter was first at issue, and that the [82] delay in the trial of this case has not been at any time due to any conduct or action on the part of Fireman's Fund Insurance Company.

The Court: Your associate has another bulletin for you.

Mr. Franklin: Yes.

Here are some letters. I am not familiar with these letters, but here is letter by Mr. Jarvis to Mr.



Pellegrini dated October 22nd, 1947, asking that the matter be—well, it is an offer of settlement. That is what this letter is. And here is another one from Mr. Jarvis under date of January 29th, 1948, where Mr. Jarvis says: "Our correspondent in Chicago has requested I inform him of the present progress." There were apparently, some settlement negotiations that were delaying the matter insofar as——

The Court: In other words, negotiations between the Government and the libellant?

Mr. Franklin: Yes, Your Honor; so that the sum total of all this is that we have been prejudiced by this delay and will be prejudiced by any allowance of interest beyond the date of judgment.

The Court: Do you know whether or not during your absence there was an effort to secure administrative settlement of this?

Mr. Mulroy: I do not know that there was any effort made by Mr. Jarvis who represented me at that time.

The Court: Well, of course, this correspondence runs on up here until 1947.

Mr. Mulroy: The denial or disallowance of any settlement by the Government was dated, I think, the 27th of June, 1947.

The Court: June, 1947. But here is another long statement, November 5th, 1947.

I will take the matter of interest under advisement and let you know in a day or so.

The prevailing side will prepare findings of fact and conclusions of law.

Mr. Franklin: Might I supplement my statement by offering in evidence these two letters?

The Court: Yes. They may be filed. They need not be offered in evidence, but they may become part of the file.

(Concluded.) [84]

Certificate

I, Bernard Ayres, do hereby certify that I was the official court reporter in the above-stated court on August 15th, 1950; that the above is a full, true and correct transcript of the proceedings, including testimony of witnesses, all objections, motions and exceptions of counsel.

/s/ BERNARD AYRES,  
Court Reporter.

[Endorsed]: Filed November 15, 1950.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO APOSTLES  
ON APPEAL

United States of America,  
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled Court do hereby certify that I am transmitting as the Apostles on Appeal in the above-entitled cause all of the original papers in the file dealing with the above-entitled action or proceeding, together with

Libelant's Exhibits Numbered 1 to 6, inclusive, and Respondent's Exhibit Numbered A-1, the same being the complete record on file in said cause; and that said original papers and exhibits hereby transmitted constitute the apostles on appeal and cross-appeal from the Decree of Court filed and entered August 31, 1950, to the United States Court of Appeals at San Francisco, California, and are identified as follows:

1. Libel in Personam filed Apr. 3, 1946.
2. Praecipe for process, filed Apr. 3, 1946.
3. Appearance of libelant, filed Apr. 3, 1946.
4. Stipulation for Costs filed Apr. 4, 1946.
5. Marshal's Return on Citation, filed Apr. 12, 1946.
6. Appearance of Respondent, Fireman's Fund Insurance Company, filed Apr. 22, 1946.
7. Answer of Fireman's Fund Insurance Co., filed Apr. 22, 1946.
8. Cost Bond of Fireman's Fund Insurance Co. filed Apr. 22, 1946.
9. Appearance of Proctors for the United States of America, filed Apr. 26, 1946.
10. Exceptions of Respondent United States of America to Libel in Personam, filed July 24, 1946.
11. Government Note for Motion Docket, filed July 24, 1946.

12. Further Exceptions of Respondent to Libel in Personam.

13. Government Memorandum of Authorities in Support of Exceptions, filed Aug. 22, 1946.

14. Note for Motion Docket, filed Aug. 22, 1946.

15. Libelant's Motion for Leave to Amend Libel, filed Sept. 26, 1946.

16. Note for Motion Docket, filed Sept. 26, 1946.

17. Letter from United States Maritime Commission to James G. Mulroy, filed Mar. 31, 1947.

17(a). Amended Libel in Personam, filed Sept. 29, 1947.

18. Answer to Amended Libel in Personam, filed June 27, 1949.

19. Demand of Respondent's Fireman's Insurance Co. for Genuineness of Documents, filed June 8, 1950.

20. Stipulation for taking testimony of Betty Jane Johnson Grant, filed July 19, 1950.

21. Reply to Answer of Respondent, United States of America, filed Aug. 1, 1950.

22. Answer to Betty Jane Johnson Grant to interrogatories, filed Aug. 8, 1950.

23. Answer to Libelant's Amended Libel, filed Aug. 9, 1950.

24. Libelant's Notice to Produce, filed Aug. 9, 1950.

25. Stipulation for Admission in Evidence of Exhibits, filed Aug. 14, 1950.

26. Trial Memorandum of Respondents Fireman's Fund Insurance Company, filed Aug. 14, 1950.

27. Stipulation for Admission in evidence of exhibits, filed Aug. 15, 1950.

28. Notice to Produce and Stipulation filed Aug. 15, 1950.

29. Letter from D. H. Jarvis to Frank A. Pellegrini, dated Jan. 29, 1948, filed Aug. 15, 1950.

30. Motion to Vacate Minute entered Order dated Aug. 16, 1950, filed Aug. 17, 1950.

30(a). Memorandum of authorities in support of Motion to Vacate, filed Aug. 21, 1950.

31. Supplemental Memorandum of Fireman's Fund Insurance Company, filed Aug. 21, 1950.

32. Notice of Presenting Decree, filed Aug. 23, 1950.

33. Findings of Fact and Conclusions of Law, filed Aug. 31, 1950.

34. Decree of District Court, filed Aug. 31, 1950.

34(a). Proposed Order Dismissing United States of America (unsigned) Lodged Aug. 31, 1950.

35. Cost Bond of Libelant filed Sept. 11, 1950.

36. Statement of Points relied upon and designation of record, filed Oct. 24, 1950.



37. Assignment of Errors, filed Oct. 24, 1950.

38. Notice of Appeal by Respondent Fireman's Fund Insurance Company, filed Oct. 24, 1950.

39. Citation on Appeal, filed & issued Oct. 24, 1950.

40. Motion for Order of Transmittal of original exhibits on appeal, filed Oct. 24, 1950.

41. Supersedeas and Cost Bond filed Oct. 25, 1950.

42. Reporter's Transcript of Testimony, filed Nov. 15, 1950.

43. Notice of Cross-Appeal of Libelant, filed Nov. 20, 1950.

44. Bond for Costs on Cross-Appeal, filed Nov. 20, 1950.

45. Statement of Points Relied upon and Designation of Record, filed Nov. 20, 1950.

46. Assignment of Errors of Cross-Appellant, filed Nov. 20, 1950.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the appellant and cross-appellant for preparation of the apostles on appeal in this cause, to-wit:

Notice of Appeal, respondents.....\$5.00

Notice of Cross-Appeal, Libelant.... 5.00



I certify that the above fees have been paid to me by the proctors for the respective parties.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 22nd day of November, 1950.

MILLARD P. THOMAS,  
Clerk.

[Seal] By /s/ TRUMAN EGGER,  
Chief Deputy.

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[Endorsed]: No. 12755. United States Court of Appeals for the Ninth Circuit. Fireman's Fund Insurance Co., a Corporation, Appellant, vs. James G. Mulroy, as Administrator of the Estate of Oscar Carl Johnson, deceased and United States of America, Appellees. James G. Mulroy, as Administrator of the Estate of Oscar Carl Johnson, deceased, Appellant, vs. Fireman's Fund Insurance Co., a Corporation, United States of America, Appellees. Apostles on Appeal. Appeals from the United States District Court for the Western District of Washington, Northern Division.

Filed November 27, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit  
No. 12755

FIREMAN'S FUND INSURANCE COMPANY,  
Appellant,  
vs.

JAMES G. MULROY, as Administrator,  
Appellee and Cross-Appellant.

UNITED STATES OF AMERICA,  
Cross-Appellee.

STATEMENT OF POINTS

Comes now appellant, Fireman's Fund Insurance Company, and proposes on its appeal to the Circuit Court of Appeals for the Ninth Circuit to rely on the following points as error:

I.

The court erred in holding that respondent Fireman's Fund Insurance Company was liable to libelant under the terms of the war risk policy issued by it on the SS "Capillo."

II.

The court erred in not holding the United States of America liable to libelant under the terms of the Second Seaman's War Risk Policy.

BOGLE, BOGLE & GATES,  
Attorneys for Appellant, Fireman's Fund Insurance Company.

Receipt of copy acknowledged.

[Endorsed]: Filed December 26, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE PRINTED AND STIPULATION AS TO EXHIBIT A-1.

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

Respondent, Fireman's Fund Insurance Company, herewith designates the following as those portions of the record and proceedings which it desires should be printed in the record of the appeal of this case to the United States Court of Appeals for the Ninth Circuit.

1. Amended Libel.
2. Answer of Fireman's Fund to Amended Libel.
3. Answer of the United States of America to Amended Libel.
4. Stipulation to take testimony of Betty Jean Johnson.
5. Answer of Betty Jean Johnson to Interrogatories.
6. Findings of Fact and Conclusions of Law.
7. Decree.
8. Petition and Order of Appeal.
9. Assignments of Error.
10. Supersedeas and Appeal Bond.
11. Citation.
12. Transcript of Testimony, including Court's oral opinion.
13. Libelant's Exhibits I to VI inclusive.
14. Statement of Points.

15. Designation of Record to be Printed.

Dated this 21st day of December, 1950.

BOGLE, BOGLE & GATES,  
Proctors for Appellant, Fireman's Fund Insurance  
Company.

Stipulation as to Exhibit A-1  
(United States of America)

It Is Hereby Stipulated and agreed by and between the proctors for the respective parties hereto that United States of America, Exhibit A-1 (being the original record of the claim of Oscar Carl Johnson for war risk insurance before the United States Maritime Commission) need not be printed or reproduced in the transcript of record, but the same may be referred to in the briefs and argument of the appeal by any of the interested parties hereto and may be submitted to this court with the same force and effect as if printed.

BOGLE, BOGLE & GATES,  
Proctors for Appellant Fireman's Fund Insurance  
Co.

/s/ JAMES G. MULROY,  
Proctor for James G. Mulroy, Administrator of the  
Estate of Oscar Carl Johnson, Deceased, Ap-  
pellee and Cross-Appellant.

/s/ J. CHARLES DENNIS,  
/s/ VAUGHN E. EVANS,  
Proctors for United States of America Cross-Appellee.

Receipt of copy acknowledge.

[Endorsed]: Filed December 26, 1950.



In The United States  
Court of Appeals

For the Ninth Circuit

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FIREMAN'S FUND INSURANCE CO., a Corpora-  
tion,

vs.

*Appellant,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased, and UNITED  
STATES OF AMERICA,

*Appellees,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased,

*Appellant,*

vs.

FIREMAN'S FUND INSURANCE CO., a Corpora-  
tion, UNITED STATES OF AMERICA,

*Appellees.*

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**Upon Appeal from the United States District Court for the  
Western District of Washington, Northern Division**

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**BRIEF OF APPELLANT FIREMAN'S FUND  
INSURANCE CO., a Corporation**

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BOGLE, BOGLE & GATES

EDW. S. FRANKLIN

*Proctors for Appellant*

Fireman's Fund Insurance  
Co., a corporation.

603 Central Building  
Seattle 4, Washington.

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# In The United States Court of Appeals

For the Ninth Circuit

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FIREMAN'S FUND INSURANCE CO., a Corporation,

vs.

*Appellant,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased, and UNITED  
STATES OF AMERICA,

*Appellees,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased,

*Appellant,*

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation,  
UNITED STATES OF AMERICA,

*Appellees.*

---

**Upon Appeal from the United States District Court for the  
Western District of Washington, Northern Division**

---

**BRIEF OF APPELLANT FIREMAN'S FUND  
INSURANCE CO., a Corporation**

---

BOGLE, BOGLE & GATES

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# In The United States Court of Appeals

For the Ninth Circuit

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No. 12755

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FIREMAN'S FUND INSURANCE CO., a Corporation,

vs.

*Appellant,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased, and UNITED  
STATES OF AMERICA,

*Appellees,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased,

*Appellant,*

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation,  
UNITED STATES OF AMERICA,

*Appellees.*

---

**Upon Appeal from the United States District Court for the  
Western District of Washington, Northern Division**

---

**BRIEF OF APPELLANT FIREMAN'S FUND  
INSURANCE CO., a Corporation**

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## **STATEMENT DISCLOSING JURISDICTION**

This is an appeal from the decree of the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. The action was instituted by the filing of a libel in personam by libelant

against Fireman's Fund Insurance Company and United States of America, seeking an alternative recovery in the amount of \$5,000.00 either from Fireman's Fund Insurance Company or United States of America on a seaman's war risk policy. The decree of the lower court dismissed the libel against United States of America, but awarded appellant Mulroy, as Administrator of the Estate of Carl Johnson, deceased, a recovery in the amount of \$5,000.00 on a war risk policy issued by Fireman's Fund to crew members of the SS "CAPILLO."

This action, of a maritime nature, is governed by Title 28 (as amended June 25, 1948) §1333, §46 U.S.C. §1128 (d) and the Suits in Admiralty Act, 46 U.S.C. §741 et seq.

## STATEMENT OF THE CASE

The SS "CAPILLO," a merchant vessel, was owned by the United States of America and bareboat chartered by the United States Maritime Commission to American Mail Line on March 27, 1940. It sailed from Westport, Oregon, October 17, 1941 for Manila under naval orders and carrying army and navy cargo. Decedent, Oscar Carl Johnson, (who will hereafter be referred to as "decedent") joined the vessel as bosun.

A rider to the Articles provided that American Mail Line would provide insurance for death due to war risks on unlicensed personnel in the principal amount of \$2,000.00. (Aps. 77).

To effectuate this war risk coverage, Fireman's Fund Insurance Company issued its Policy No. 6622 (Aps. 47) covering certain enumerated war risks to which the SS "CAPILLO" might be exposed on the voyage. By a rider to the policy the coverage for deaths due to war risks causes incurred by unlicensed personnel was increased to \$5,000.00. (Aps. 51, 52). Decedent, as bosun, was classified as unlicensed personnel.

While en route to Manila the decedent developed a lung ailment, and became very ill. He was coughing and expectorating blood, and was removed to the ship's hospital. (Aps. 107). When the vessel reached Port Moresby a doctor was called to see him, who advised that he be immediately hospitalized when the vessel reached Manila (Aps. 106, 107, 108).

The vessel arrived at Manila November 28, 1941. The decedent's condition en route from Port Moresby to Manila became exceedingly worse (Aps. 108). He developed a fever and continually expectorated blood. It was feared he would not survive the trip. (Aps. 108). Because of his exceedingly critical condition the Master broke wartime regulations and sent a radio message to Manila before the arrival of the vessel to have a doctor meet the vessel when it arrived there. The decedent was immediately taken off the vessel in Manila and placed in St. Joseph's hospital (Aps. 109) on November 28, 1941. Another seaman was promoted to take the decedent's position as bosun.

Subsequently, and while Johnson was receiving medical treatment in the hospital at Manila, the "CAPILLO" left Manila Harbor December 25, 1941 for Corregidor, where it anchored. It was then subjected to incessant daily bombings until December 29, 1941 when the vessel caught fire and was abandoned by the Master and members of the crew, who were all subsequently interned (Aps. 81).

On January 6, 1942 the deceased was likewise interned. The subsequent course and progression of the decedent's illness is reflected in the report of Dr. Hugh L. Robinson, his attending physician (Aps. 44, 45). A preliminary diagnosis of tuberculosis was made. He was treated in various tubercular hospitals without success and later a diagnosis of abscess of the lung was made. He was in the camp hospital at Santo Tomaso prison camp from October 21, 1942 until August 7, 1943, when he died from his prolonged illness (Aps. 82).

The deceased had previously advised Dr. Robinson that dust had settled in his lungs from working in the mines or tunneling, in which work he had been engaged for a number of years. (Aps. 114).

Captain Dreyer, the master of the "CAPILLO" had sailed with the decedent in 1938 at which time he had presented a sickly appearance (Aps. 114, 115).

## QUESTION PRESENTED

Where a seaman contracts a progressive and ultimately fatal illness for which condition he is permanently separated from the vessel prior to any declaration of war, and subsequent to the declaration of war is interned for a period of twenty-one months, is his death due to a "war risk" covered by appellant's war risk policy?

## LOWER COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The lower court found that at no time prior to the institution of this action had the United States determined that the war risk policy issued by Fireman's Fund on the SS "CAPILLO" provided inadequate protection to the deceased so that coverage under the Second Seaman's War Risk Policy issued by the United States of America became effective (Aps. 22). The court found that the Fireman's Fund war risk policy was in effect on August 6, 1943 when decedent died.

In finding No. 7, the lower court further found that the deceased died "as a direct and proximate result of warlike acts of the enemy Japanese, and by reason of their capture, arrest, restraint and detainment of Carl Johnson, and as a direct and proximate result of the treatment suffered by said seaman while a prisoner as aforesaid, the said Carl Oscar Johnson died in a Japan-



ese War Prison Camp in the Philippine Islands on or about August 6, 1943." (Aps. 23).

The court concluded that appellee Mulroy, as Administrator of Johnson's estate, was entitled to recover the sum of \$5,000.00 on the war risk policy issued by Fireman's Fund (Aps. 25) and dismissed the United States of America from the litigation (Aps. 24). A decree in accordance with the foregoing finding and conclusions was thereupon entered, from which appellant has appealed to this Court.

## WEIGHT ATTACHED TO LOWER COURT'S FINDINGS

This, being an admiralty appeal, is trial de novo in this court. In the trial below, libelant called no witnesses, resting his case entirely on stipulated documentary evidence. Fireman's Fund called as witnesses Captain Dreyer, master of the "CAPILLO" and an expert medical witness, Dr. Slyfield. There was no conflict in the documentary or oral testimony presented, nor did the trial involve the credibility of any of the witnesses actually testifying. The case was presented and considered by the court below principally as a question of law. Under such circumstances the presumption in favor of the trial court's findings of fact is very nebulous. *The Diamond Cement*, 95 F. (2d) 739 (CCA 9). As this court said in the recent case of *Matson Navigation vs. Pope & Talbot*, 149 F. (2d) 205:

“The rule in admiralty cases is that, although an appeal opens the case for a trial de novo, findings of fact are entitled to great weight, but such rule is modified where the findings are based wholly upon depositions. \* \* \* (citing cases). In cases in which witnesses testify in open court and depositions are also introduced, the rule is subject to modification in the sound judgment of the appellate court.”

In the *Ernest H. Meyer*, 84 F. (2d) 496, this court said:

“It is obvious that where the testimony is in part by deposition and in part heard by the court, and the conflict is between the heard and unheard witnesses there cannot be a balancing of credibility between the two.”

### ASSIGNMENT OF ERROR

(1) The court erred in finding that libelant was entitled to recover under the War Risk Policy issued by Fireman's Fund Insurance Company for the death of Carl Oscar Johnson, Deceased.

(2) The court erred in entering the decree herein. (Aps. 30).

Alternatively, appellant contends that since the United States recognized its liability under the Second Seaman's War Risk Policy for the death of decedent, any recovery should be against the United States and not against Fireman's Fund.

## SUMMARY OF ARGUMENT

Fireman's Fund war risk policy did not cover decedent's death for the following reasons:

(1) It was not proximately caused by any peril insured against in the policy.

(2) It occurred on land unconnected with any of the enumerated risks of the policy.

(3) Decedent's death was due to sickness.

(4) The United States recognized Fireman's Fund war risk policy was inapplicable to decedent's death and processed the administrator's claim for allowance under the Second Seaman's War Risk Policy but later rejected the same on the unauthorized and erroneous grounds that decedent's sole beneficiary, his daughter, was not financially dependent upon him at the time of his death.

## INSURING CLAUSE IN APPELLANT'S WAR RISK POLICY

The insuring clause in Fireman's Fund war risk policy reads as follows:

"This insurance covers only contractual liability of the assured for claims for loss of life or injury to or disability of unlicensed personnel, not exceeding eight (8) and unlicensed personnel, not exceeding thirty-two (32), as result of capture, seizure, destruction or damage by men of war, piracy, taking at sea, arrest, restraints and detainments and other warlike operations and acts of Kings, Princes and Peoples in prosecution of hostilities, whether before or after

declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution or rebellion or insurrection, or civil strife arising therefrom, and including the risks of aerial bombardment, floating or stationary mines and stray or derelict torpedoes. In no case shall liability of these Underwriters exceed \$5,000.00—each in respect to licensed personnel nor \$2,000.00—each in respect to unlicensed personnel.

## **SCHEDULE ONE**

The Assurer will pay, in case of loss, an amount to be determined by applying the percentage shown below to the amount for which the master, officer, or member of the crew is insured, as follows:

(Schedule follows)

The indemnities referred to above are payable, provided loss results directly and exclusively from bodily injuries, within ninety (90) days from the date of accident. Loss shall mean, with regard to hands and feet, arms and legs, dismemberment by severance at or about wrist or ankle, knee or elbow joints, or the complete and irrecoverable loss of function. With regard to eyes, complete and irrecoverable loss of sight. With regard to hearing, total and irrecoverable loss of hearing in both ears.

## **SCHEDULE TWO**

For injury not described in Schedule One, but not for illness, resulting in permanent disability preventing the person injured from performing any and every kind of duty pertaining to such person's occupation, the Assurer will pay compensation at the same rate as the earnings of the injured person immediately preceding the injury, payments to be made in monthly installments until such time as the total compensation as paid shall amount to the principal sum for which the injured master, officer or member of the crew is insured. Notwithstanding anything herein contained to the contrary, it is agreed this in-

insurance shall not be vitiated by a deviation or change of voyage of the vessel, in which event an additional premium shall be paid if required."

(Aps. 49).

The language employed in the insuring clause to define war risks is the conventional phraseology employed in the Free of Capture and Seizure Clause (F. C. & S. Clause) usually found in marine policies. Its genesis is explained in Arnould on Marine Insurance and Average (12 ed) p. 19, as follows:

"In 1898, owing to a feeling that war risks should not be covered by any ordinary insurance, the policy in use at Lloyd's was by a resolution of the members modified by the insertion of the following clause between the clauses numbered (13) and (14) above: "Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." At the beginning of 1899, however, this resolution was superseded by another resolution which declared that all policies at Lloyd's should contain this warranty against (or, to use a more correct expression, this exception of) war risks, unless the contrary be written or printed in the slip of the agreement previously signed or initialed by the underwriters (j)."

The risks insured against in this policy are those violent risks traditionally incurred by the vessel itself in the case of actual or threatened wartime hostilities. They contemplate death or injuries sustained by a seaman as the proximate result of any of the enumerated risks occurring to the vessel. The disabilities in Schedule I of the policy are limited to injuries sustained



within 90 days from the date of the accident. Schedule II provides for partial disabilities resulting from injury. Disabilities from illnesses are specifically excluded. Incidents occurring on land and totally unrelated to the marine war risks enumerated in the policy are plainly not embraced within its scope.

## RULE OF PROXIMATE CAUSE IN WAR RISK POLICIES

It is elementary that the burden of proof is upon the administrator of the deceased to establish by a preponderance of the evidence that the proximate cause of his death was due to one of the hazards or risks enumerated in the Fireman's Fund Policy. In determining the rule as to proximate cause in a war risks policy, the Supreme Court of the United States in the case of *Standard Oil vs. United States of America*, decided November 27, 1950 (1950 U. S. Supreme Court L. ed. Advance Opinions, page 106, said :

“Proximate cause in the insurance field has been variously defined. It has been said that proximate cause referred to the “cause nearest to the loss.” Again courts have properly stated that proximate cause referred to the cause nearest in point of time to the loss. But the true meaning of the maxim is, that it refers to that cause which is most nearly and essentially connected with the loss as its effectual cause.”

In the same opinion, Judge Frankfurter observed :

“The scope of the undertaking to cover for such losses is partly the law's confirmation of the settled



understanding of those whose business is shipping—their understanding of what contingencies the undertaking covered. It is partly the law's endeavor, in view of the inevitable treacheries of language, to shield the insurer from liability for loss on the basis of a factor too remote, and therefore too tenuous in the combination of elements that converge towards the loss."

This court was called upon to apply the doctrine of proximate cause in war risk policies in the case of *Link vs. General Insurance Company*, 173 F. (2d) 995.

### DECEDENT'S ILLNESS AND DEATH NOT PROXIMATELY DUE TO WAR RISK

It is uncontradicted that decedent's death was due to a progressive and fatal illness which began aboard the "CAPILLO" sometime prior to November 17, 1941. His fatal illness began prior to the declaration of war against Japan. As a result of his illness (and likewise prior to the declaration of war, on November 29, 1941 the decedent was obliged to leave the vessel at Manila to undergo hospital treatment and permanently separated from the vessel at that time. He never rejoined the vessel thereafter. His progressive illness was in no way connected with the subsequent bombings of the "CAPILLO" at Corregidor on December 25, 1941. This was a risk covered by appellant's policy.

The finding of the lower court that the decedent's death was due to his "capture or arrest, restraint or detention" fixes a liability upon appellant for death due

to disease and to the alleged results of shore-side confinement, risks which were specifically negative by the express terms of the policy itself.

Presumably, the lower court, in referring to decedent's "treatment" after internment, proceeded upon the theory that dietary deficiencies which may have been experienced by the decedent while a prisoner and the inability to perform an operation for a lobectomy upon decedent were the contributing proximate causes of decedent's death and risk insured against by Fireman's Fund Insurance policy. The court's questioning of appellant's two witnesses justifies this assumption. In Article VII of the Amended Libel, it was alleged that because of the "detention of, treatment and hardship inflicted upon the said Carl Johnson" he died (Aps. 6).

This finding is highly speculative and conjectural and has no factual basis. Captain Dreyer stated that living conditions in the internment camp were good until May of 1943 while the civilians were in charge (Aps. 117).

The report of Mr. Everett, the Manila agent for American Mail Line, under date of April 11, 1945 found in United States Exhibit No. I states that decedent died while camp conditions were at their best. Undoubtedly, decedent like others suffered hardship and privations, compared with normal civilian life, but his prison camp environment cannot be said to be the dominant cause of

his death. Dr. Slyfield testified malnutrition was a minor factor in decedent's death (Aps. 122).

Other than the report of Dr. Robinson (Aps. 44-46 inc.) who recommended a lobectomy operation upon decedent, appellee introduced no medical testimony as to the proximate cause of decedent's death. Dr. Frederick Slyfield, a leading chest specialist of Seattle, testified that in his opinion deceased's fatal disease developed aboard the SS "CAPILLO" November 1, 1941 (Aps. 120) and progressed in the usual fashion of lung abscesses until his subsequent death; that prior to the advent of penicillin 75% of persons suffering from lung abscesses died; that it was exceedingly unlikely that the deceased could have survived the performance of a lobectomy upon him because of the long continued abscess of the lungs from which he had suffered and which eventually caused his death (Aps. 102).

It is respectfully urged that the findings of the lower court are completely lacking in evidential bases in classifying decedent's death as being proximately caused by any enumerated war risk in the Fireman's Fund war risk policy, and that the same are plainly erroneous and should be reversed and a decree of dismissal entered in favor of Fireman's Fund Insurance Company.

## WHAT ARE WAR RISKS?

The mere fact that in time of war a member of the crew of a merchant vessel was injured or died or loses his life and there is a policy covering him against "war risks" does not entitle him or his representatives to recover against the one so insuring unless the injury or death is a result of a risk of war. The war must be the proximate cause of the fatality. *Dennehy vs. U. S.*, 15 F. (2d) 196.

In a series of cases involving the Second Seaman's War Risk Policy, the courts have been called upon to construe war risks as the term is employed in the broader coverage of that policy, compared with the restrictive phraseology of appellants policy.

In *Gadsen vs. U. S.*, 54 F. Supp. (U.S.D.C. Md.) Judge Chesnut, in denying recovery under a Second Seaman's War Risk Policy because of the death of a seaman due to heart disease, which was a result of him being "badly scared" by a submarine alarm, said:

"The weight of the evidence in the case shows that the death of the deceased was due to disease and not to a war risk. The policy is generally referred to as "war risk insurance." It is also very doubtful indeed whether the aggravation of the heart disease from which the seaman in this case was suffering by being badly scared by the submarine alarm would constitute a "bodily injury" within the fair meaning of the policy. See 11 C.J.S. bodily—376-377."

In *Carson vs. U. S.*, 89 F. Supp 114, a seaman who was returning to a ship after midnight during the

blackout fell from a bridge and was injured and filed a claim under the Second Seaman's War Risk Policy. The court said:

"The review of the judicial decisions cited by counsel confirms my previously tentatively expressed view that the accident is not within the coverage of the policy. It will be noted that the coverage is principally based on personal injuries "directly and proximately caused by risks of war and war-like operations." The particular inclusions are those which are peculiarly applicable to ships and seamen and the personnel covered by the policy are the masters, officers, and crews of vessels and "other persons employed or transported thereon" against the loss of life, personal injury, or detention related to the prosecution and defense of hostilities. *The wording of the insuring clause, is, therefore, seemingly not applicable to accidents resulting in personal injury occurring on land and not directly associated with the ship.* An aerial bombardment is mentioned as included in the insuring clause, but there is no evidence that there was any aerial bombardment at the time of the libellant's injuries, or that it was caused thereby." (Italics ours).

In *Rogel v. United States*, 84 F. Supp. 781 (U.S.D.C. E.D.N.Y.) liability under the Second Seaman's War Risk Policy was denied to a seaman who developed a peptic ulcer aboard the vessel because of a lack of evidence establishing that this condition resulted from any of the enumerated war risks in the policy.

In *Ferro v. United States Lines*, 74 F. Supp. 250 (U.S.D.C., E.D.N.Y.), where a seaman disappeared overboard without any evidence to explain his act or connect it with war risk insurance, the claim was denied, the court saying:



“In order to form the basis for a recovery under the policy, the restraints and warlike operations must be shown to be the proximate cause of a seaman’s injury or death. *Crist v. United States War Shipping Administration*, D. C. E. D. Pa. 1946, 64 F. Supp. 934. There can be no recovery under the terms of the policy if the injury or death is only remotely or indirectly related to the restraints or warlike operations. The record in this case does not reveal any proximate causal relationship between the restraints and warlike operations enumerated above, and Ferro’s death.”

In the very recent case of *Faison vs. United States*, 92 F. Supp. 801 (U.S.D.C.) S.D.N.Y.) a seaman while on shore leave was killed when the wall of a building previously damaged by bombardment collapsed. He filed a claim under the Second Seaman’s War Risk Policy, which was denied. The court in denying recovery said:

“In order to form a basis for a recovery under the Second Seaman’s War Risk Insurance Policy for the loss of life of an insured, the risks of war, warlike operations, aerial bombardments and the other risks enumerated in the policy must be shown to be the proximate cause of the seaman’s death. *Reinold v. United States*, 2 Cir., 1948, 167 F. 2d 556, certiorari denied, 35 U. S. 824, 69 S. Ct. 48, 93 L. Ed. 378; *Stofey v. United States*, D. C. Pa. 1950, 87 F. Supp. 81; *Carson v. United States*, D. C. Md. 1950 89 F. Supp. 114; *Ferro v. United States*, S.D. N.Y. 1947, 74 F. Supp. 250. In *United States v. Standard Oil Co.*, 2 Cir., 1949, 178 F. 2d 488, 493, the court defined “war risk” in relation to proximate cause as follows: “Our own court has emphasized that the proximate cause of a loss must have been warlike in order to make the loss a war risk. \* \* \* And search for the ‘cause nearest the loss’ has been the basis for the determination of liability under analogous circumstances in many



other cases. \* \* \* Thus we believe a correct statement of the American rule to be that under a policy which expressly insures against war risks or 'all consequences of hostilities or warlike operations,' the coverage extends only to perils due directly to some hostile action, military maneuver, or operational war danger, and does not include the aggravation or increase of a maritime risk because of war operation. \* \* \*

"\* \* \* Another factor which bars recovery under the Second Seaman's War Risk Insurance Policy in this case is the fact that the injury causing death was sustained ashore while the seaman was on leave and it was not directly associated with the ship."

Even injuries occurring on shipboard due to a warlike environment but not proximately due to an enumerated war risk are held non-compensable.

In *Reinold vs. U. S.*, (2 CCA) 167 Fed. (2d) 556, the death of the mate due to an intoxicated member of the armed guard, was held not the result of "warlike operations" or "acts in prosecution of hostilities."

A similar conclusion was reached in *Chandler v. U. S.*, 94 F. S. 580 (U.S.D.C. S.D.N.Y.) where a seaman was severely injured aboard the ship while examining a war souvenir which exploded.

These authorities clearly indicate the error of the lower court's findings and decree in holding that decedent's death on shore many months after a pre-war contracted illness constitutes a war risk under appellant's policy.

**IF DECEDENT'S DEATH DUE TO "WAR RISK"  
COVERAGE ASSUMED BY UNITED STATES  
UNDER SECOND SEAMAN'S WAR RISK POLICY**

The statutory authority for merchant seamen's war risk insurance is found in the Merchant Marine Act of 1936 as amended, (46 U.S.C.A., Sec. 1128 to 1128g). Title 46, Section 1128 (a) (e) authorizes the insurance by the government of crew members against loss of life, personal injury or detention by an enemy of the United States following capture.

By an amendment dated April 11, 1942, Title 46, Section 1128 (g) the insuring authority was transferred from the United States Maritime Commission to the War Shipping Administration.

Title 46, Section 1128 (a) authorized the War Shipping Administration to provide such merchant crew war risk insurance "where it appeared" (1) such insurance adequate for the needs of transportation in the water-borne commerce of the United States and its Territories and possessions (including the Philippine Islands, the Canal Zone, and any bases or lands leased or occupied by or on behalf of the United States), or of other transportation by water or other vessel services deemed by the Commission to be in the interest of the war effort or the domestic economy of the United States,, cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States, or (2)

the furnishing by the Commission of such insurance or reinsurance with respect to any such transportation or other vessel services at nominal or other rate basis would be of material benefit to the war effort, or (after consultation with the Office of Price Administration or other agencies) to the domestic economy of the United States, or (after consultation with the Secretary of the Navy or the Secretary of War) is necessary or advisable for military or naval reasons."

At the outset of the second World War merchant marine crew insurance was initially effected in many in many instances against war risk through private insurance companies. The type of insurance written proved to be too restrictive in scope and ill adapted to afford the broad protection to newly developing war risks which the government felt merchant seamen should have. To afford more liberal war risk protection to merchant seamen, which private companies were unwilling to give, Title 46, Section 1128 (a) was amended March 24, 1943 by Chapter 26, Public Law 17, Title 50, War Appendix, Section 1292, reading in part as follows:

"\* \* \* (b) Whenever the Administrator, War Shipping Administration, finds that, on or after October 1, 1941, and before thirty days after the date of enactment of this subsection, a master, officer, or member of the crew of, or any persons transported on, a vessel owned by or chartered to the Maritime Commission or the War Shipping Administration or operated by or for the account of, or at the direction or under the control of the Commission or the Administration, has suffered death, injury, detention,

or other casualty, for which the War Shipping Administration would be authorized to provide insurance under Subtitle—Insurance of Title II of the Merchant Marine Act, 1936, as amended by this Act (Title 46 §1128a), the Administrator may declare that such death, injury, detention or other casualty, shall be deemed and considered to be covered by such insurance at the time of the disaster or accident, if the Administrator finds that such action is required to make equitable provision for loss or injury related to the war effort and not otherwise adequately provided for: *Provided*, That in making provision for insurance under this subsection the Administrator shall not provide for payments in excess of those generally provided for in comparable cases under insurance hereafter furnished under the said Subtitle—Insurance of Title II (Title 46 §1128a) as amended: *Provided further*, That any money paid to any person by reason of insurance provided for under this subsection shall apply in pro tanto satisfaction of the claim of such person against the United States arising from the same loss or injury. There shall be no recovery of any money paid on account of insurance provided for the masters, officers, or members of the crew, or individuals transported on, any vessel under this sub-section or under Subtitle — Insurance of Title II of the Merchant Marine Act, 1936, as amended (sections 1128-1128h of Title 46), from any person who in the judgment of the Administrator, War Shipping Administration, is without fault, and when in the judgment of the Administrator such recovery would defeat the purposes of benefits otherwise authorized or would be against equity and good conscience. The declarations, findings, and actions of or by the Administrator under this subsection shall be final and conclusive. \* \* \*.”

This legislation is familiarly referred to as Public Law 17 or the Clarification Act of 1943.

The Congressional reasons impelling its enactment are explained in the report of the Senate Committee on



Commerce, Page 213, U. S. Code, Congressional Service, 78th Congress, 1st Session, 1943, reading as follows:

“Insurance protection for seamen” — Another problem primarily affecting seamen and their dependents is the need of providing more complete protection to seamen and their dependents in case of loss of life or bodily injury to such seamen. Notwithstanding the apparent intent of Congress to provide adequate insurance protection under the revision to the War Risk Insurance Act approved April 11, 1942 (Public Law 523, 77th Cong.), it appears that amendment is necessary to avoid the danger of a denial of insurance benefits in cases of death or injury arising from war conditions not within the strict interpretation of “war risks.” That term was, of course, not intended to be construed in its most limited and technical sense, but rather as commonly understood to cover all risks arising out of the war.”

Pursuant to this broad statutory authority, the Maritime War Emergency Board of War Shipping Administration promulgated a master policy of war risk insurance upon merchant seamen which it designated as the Second Seamen’s War Risk Policy, effective March 15, 1943. It is set out in C. of F. R., 1943 Supp., Title 46, Sec. 341.95, pages 2125, et seq.

By Article II the War Maritime Emergency Board made the Second Seamen’s War Risk Policy effective retroactively to risks such as decedent incurred, reading as follows:

“This decision and the form of insurance policy attached hereto, known as the Second Seaman’s War Risk Policy, shall be effective as to all voyages the Articles for which were opened on or after 12:01

A. M. of March 15, 1943. (In those cases in which Articles were not used, the date of the commencement of the voyage shall govern.) Benefits as to all Masters, Officers and Crew Members of vessels the Articles for which were opened before 12:01 A. M. of March 15, 1943 (in those cases in which Articles were not used, the date of the commencement of the voyage shall govern), and who are disabled as a result of a peril insured against by the Second Seamen's War Risk Policy occurring after 12:01 A. M. on March 15, 1943, shall be governed by and payable in accordance with the Second Seamen's War Risk Policy. Life insurance with respect to such personnel shall, however, be governed by and payable in accordance with the terms of the policy covering such personnel on the date of the commencement of the voyage, if Articles were not used); *Provided, however*, That any beneficiary or person who (1) Either is entitled to the benefits of such a policy because of the loss of life of the insured as a result of a peril occurring on or after 12:01 A. M. of March 15, 1943, or (2) Would have been entitled to such benefits if the peril occurring on or after 12:01 A. M. of March 15, 1943, although not a peril insured against under such policy, does constitute a peril covered by the Second Seamen's War Risk Policy,

may receive payments of life insurance benefits in accordance with the provisions of the Second Seamen's War Risk Policy on the condition that such beneficiary or person validly releases and relinquishes all of his rights under such prior policy."

The much broader war risk coverage is set forth in Article III of the Second Seaman's War Risk Policy reading as follows:

"The insurance is for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately caused by risks of war and warlike operations, in-



cluding capture, seizure, destruction by men-of-war, sabotage, piracy, takings at sea, arrests, restraints and detentions, acts of kings, princes and peoples in the prosecution of hostilities or in the application of sanctions under international agreements, whether before or after declaration of war and whether by a belligerent or otherwise, including factions engaged in civil war, revolution, rebellion or insurrection, scuttling to prevent capture, aerial bombardment, or, attempts at, or measures taken in defense of, all of the foregoing acts, floating or stationary mines, torpedoes, whether derelict or not, collision caused by failure, in compliance with wartime regulations, of said vessel or any vessel with which she is in collision, to show the usual full peacetime navigation or anchorage lights, stranding caused by the absence of lights, buoys, or similar peacetime aids to navigation consequent upon wartime regulations, stranding caused by the failure of said vessel to employ a pilot in waters where a pilot would ordinarily be employed in peacetime, but in which the employment of a pilot is dispensed with in compliance with military, naval or other governmental orders, or with a view to avoiding imminent enemy attack (for the purposes of the foregoing, the failure to show lights, the absence of lights, buoys, etc., and the failure to employ a pilot shall be presumed to be the cause of the collision or stranding unless the contrary be proved, and stranding shall include sinking consequent upon stranding or contact with any part of the land), collision with another vessel in the same convoy or collision with any military or naval vessel, that is to say, a vessel manned by and under the control of military or naval personnel and designed to be employed primarily in armed combat service, stranding, collision or contact with any external substance (including ice, but excluding water), as a result of deliberately placing the vessel in jeopardy, in compliance with military, naval or other governmental orders in order to avoid imminent enemy attack, or as an act or measure of war taken in the actual process of embarking or disembarking troops or loading or unloading material of war.

The fact that a vessel, or any vessel with which such vessel is in collision, is carrying troops or military or other supplies, or is proceeding to or from a war base, or is manned or operated by military or naval personnel, shall not alone be sufficient to include in this policy any claim which is not included by the foregoing terms of this article.

The insurance is also for loss of life, disability (including dismemberment and loss of function), loss of or damage to personal effects, and detention, (including the occurrence of other situations hereinafter provided) of the insured, directly and proximately resulting from stranding, sinking, or break-up of the vessel, explosion or fire causing loss of or substantial structural damage to the vessel, or collision by the vessel or contact with any external substance (including ice, but excluding water), irrespective of whether the same are caused by risks of war or war-like operations or by marine risks and perils."

Where the deceased seaman failed (as did decedent) to designate a beneficiary to receive the benefits of the Second Seaman's War Risk Policy, Subsection C of Article VII of the Seamen's War Risk Policy provides as follows:

"If the insured shall have no lawful widow or widower of him or her surviving but shall have a child or children of him or her surviving, 100% to the child or children in equal shares."

Recognizing that the Fireman's Fund war risk policy issued on the "CAPILLO" was inadequate to provide the necessary coverage to the seamen or protection for the deceased, demanded by Public Law 17, the War Shipping Administration by letter of F. L. Simpson, its Chief Adjuster, dated February 5, 1943, accepted jurisdiction of decedent's claim under Public Law 17

(Exhibit United States of America A-1). The application of Public Law 17 and the Second Seaman's War Risk Insurance to members of the merchant crew of the SS "CAPILLO" was formally signalized by a written agreement entered into on June 9, 1944 between American Mail Line and War Shipping Administration. A photostatic copy of this agreement is found in United States Exhibit A-1. The agreement contains a specific finding that the crew members of the SS "CAPILLO" were subject to Public Law 17 and that the War Shipping Administration was required to make the requisite statutory adjustment as to insurance and other benefits authorized under that law.

After administratively adjudicating decedent's beneficiaries were entitled to the benefits of the Second Seaman's War Risk Policy, the War Shipping Administration caused an investigation to be made as to the dependency of his sole survivor, decedent's daughter, upon him at the time of his death. On August 14, 1944 an ex parte report of the Federal Bureau of Investigation was filed with the Bureau of War Risk Insurance, in which the investigator concluded no dependency existed. Based upon this report of lack of dependency, by letter dated June 19, 1947, the administrator's claim was disallowed, which resulted in the bringing of this action.

It is interesting to note that the claim of another "CAPILLO" seaman, one John Baptist Ball, who like-

wise died in the prison camp, was recognized and paid under the Second Seaman's War Risk Policy.

The administrative disallowance of decedent's claim under the Second Seaman's War Risk Policy after its initial recognition was arbitrary, capricious, and unlawful. There is no statutory or administrative rule making dependency a pre-requisite to benefits. It was conjured out of thin air.

Subsection C of Article VII plainly requires that a beneficiary daughter receive the full face value of the Second Seaman's War Risk Policy in the amount of \$5,000 regardless of dependency, where no surviving wife exists. Public Law 17 fails to prescribe dependency as a condition precedent to benefits under the Second Seaman's War Risk Policy. Since the War Shipping Administration made the statutory finding required by Title 46, Sec. 1128 (a) (1) that the Fireman's Fund Policy was not "adequate" coverage for the decedent and other members of the crew of the "CAPILLO," it is respectfully submitted that it then became the mandatory statutory duty of the United States to pay the full benefits of the Second Seaman's War Risk Policy to decedent's daughter regardless of dependency. It is further to be noted that decedent's daughter testified by interrogatories filed in the case that she was actually dependent upon the decedent at the time of his death, and she was not contradicted.

That portion of Finding No. 5 "That at no time did the United States or any officer or agency thereof find



that it appeared or that it was a fact, that the conditions as set out in Section 1128 (a), Title 46, U. S. C., as a prerequisite to furnishing war risk insurance or reinsurance upon the SS "CAPILLO" existed with respect to said voyage so as to bring in force and effect said Second Seaman's War Risk insurance policy covering said Oscar Carl Johnson on said voyage. That in the absence of such finding, the said so-called Second Seaman's War Risk policy did not come into force and effect as to said Oscar Carl Johnson" is plainly erroneous in view of the facts recited above.

It was therefore error for the lower court to hold Fireman's Fund liable on its policy and dismiss the respondent United States of America from liability under the Second Seaman's War Risk Policy and the decree herein should be reversed for that reason.

### **ANSWER TO CROSS-APPELLANT'S ASSIGNMENT OF ERROR ALLOWING INTEREST ONLY FROM DATE OF JUDGMENT**

In cross-appealing from the decree entered in his favor against Fireman's Fund Insurance Company, the Administrator cross-appealed upon the following alleged error.

(2) Denying libelant's motion to vacate the court's minute entered order dated August 16, 1950 directing that Judgment herein "will carry interest only from the date of judgment" (Aps. 33).

In finding No. IX, with reference to the allowance of interest against Fireman's Fund, the court entered the following finding:

"That libellant has delayed pressing the claim against Fireman's Fund for trial in an effort to establish primary liability against the United States or to secure payment from the United States under the provisions of Title 50, U.S.C., Appendix .1292 (b). That in view of such delay and the fact that the liability of said Fireman's Fund was contingent and unliquidated, it would be an abuse of discretion to allow interest on said claim prior to date of judgment herein."

### **TRIAL DATE DELAYED BECAUSE OF SETTLEMENT NEGOTIATIONS**

No claim or demand for payment under appellant's policy was made by decedent's administrator prior to the institution of the libel on April 3, 1946, in which recovery was sought against it in the event recovery was disallowed against the United States under the Second Seaman's War Risk Policy.

As reflected in the voluminous exhibit, United States Exhibit No. 1, Mrs. Betty Johnson Grant, decedent's daughter, initiated her claim under the Second Seaman's War Risk Policy on July 27, 1944. Negotiations continued between the parties until shortly before the trial of the case at Seattle, Washington on August 15, 1949. In November, 1946 Mr. Mulroy, the deceased's administrator, took over the negotiations for decedent's daughter. Mr. Mulroy was subsequently in Ger-



many from June, 1947 to June, 1949. In his absence the negotiations were conducted by an associate.

The setting of the case on previous occasions had been vacated because of the pendency of these negotiations. The case was finally set for trial at appellant's insistence.

Since appellant's liability was contingent and existed only if the recovery was denied under the Second Seaman's War Risk Policy and since the delay in bringing the matter on for trial was due to the extensive and protracted negotiation between decedent's daughter, her various counsel, and War Shipping Administration, as found by the lower court it would be highly inequitable to award interest against appellant prior to August 31, 1950, the date the decree was entered.

### **ALLOWANCE OF INTEREST DISCRETIONARY IN ADMIRALTY**

It is uniformly held that the allowance of interest is discretionary in admiralty cases.

In *The Stjernbourg*, 106 F. 2d 896, Judge Haney in considering the imposition of interest in the case of delay in the prosecution of litigation said at page 898:

"Third. Appellants also contend that "in admiralty interest may be properly disallowed or reduced because of unusual delay in the prosecution of an admiralty cause." Appellants concede that they are responsible for a part of the delay, but that "there is a substantial excess of delay justly chargeable to appellee." The record does not disclose which of the

parties caused the delay. The allowance of interest is discretionary. The *Albert Dumois*, 177 U. S. 240, 255, 20 S. Ct. 595, 44 L. Ed. 751. In the absence of anything in the record disclosing who may be blamed for the delay, we are not warranted in holding that the trial court abused its discretion."

In the case of *U. S. v. Bethlehem Steel Corporation*, 23 F. Supp. 676 is quite similar to the case at bar. The question involved in that case was whether interest should be allowed on an allowance for bonus based upon a percentage of saving. The court said:

"Payment was not due until the saving was determined. This means here that the sum due does not bear interest until ascertained and hence not until judgment recovered. This in theory is no hardship to the contractor. He may press his claim promptly to judgment. He cannot turn it into an investment bearing, as is claimed here, six per cent interest, thereby doubling the final payment to be made."

In the case of *Christian & S. D. Shipping Co. v. Marsh*, (3rd CCA) 31 F. (2d) 686, the court recognized that a libelant was not entitled to interest due to protracted delay. The court said:

"We are not inclined to allow interest for the time the test case was being litigated and for the time taken when the parties were negotiating for a settlement without litigation."

In *The Salutation*, (2 CCA) 37 F. 2d 337, the court in declining to grant interest because of delays in litigation and the claim being unliquidated, said:

"Interest was allowed by the commissioner, and the District Court from June 9, 1920, the time of the filing of the libel. The case was on the calendar and

not tried until October 9, 1924, and the District Court did not enter the interlocutory decree until October 26, 1925. The report of the commissioner was filed January 19, 1928, and the final decree was entered January 22, 1929. This unexplained delay in the prosecution of this case should deprive the appellee of interest on the award. Indeed, it was only after a motion conditionally granted to dismiss for lack of prosecution that the case was brought to trial. Such delays are sufficient reason for forfeiting interest. *The James McWilliams* (C. C. A.) 240 F. 951; *The Edward G. Murray* (CCA) 278 F. 895. Interest is discretionary in a court of admiralty. *Dyer v. Nat. Steam Navigation Co.*, 118 U. S. 507, 6 S. Ct. 1174, 30 L. Ed. 153; *J. G. Gilerist* (D. C.) 173 F. 666; *The North Star* (D. C.) 140 F. 263. It was an abuse of discretion to allow interest on this award of damages. In view of these delinquencies of the appellee, interest will be allowed only from January 22, 1929, the date of the final decree. \* \* \*

“\* \* \* Some of the delay in this litigation to which we referred in denying the appellee interest on the award of damages of the master was due to delay of decision by the court below. The trial judge delayed one year in finding the appellant responsible for the collision, and another District Judge delayed one year in confirming the master's report on the damages. While these unfortunate delays cannot be charged to the appellee, and should not prejudice its rights, still much of the delay in this simple litigation, due to the appellee, was inexcusable, as we indicated in our opinion.

Moreover, the claim is for unliquidated damages, shown by evidence, which, while having sufficient probative force to support the decree, was not free from uncertainty as to the extent of the loss. A wise exercise of judicial discretion requires a denial of interest on the award other than allowed in our opinion.”

We respectfully urge that in the event that this court affirms the lower court's decree that its findings as to the disallowance of interest prior to the date of the entry of the decree is proper and should be affirmed.

### SUMMARY

In conclusion, appellant respectfully urges that the decree of the lower court adjudging it liable under its war risk policy to appellee administrator be reversed for the reasons stated herein and if the death of decedent be held due to a war risk, that the United States of America be held liable therefore under the Second Seaman's War Risk Policy.

Respectfully Submitted,

BOGLE, BOGLE & GATES

EDW. S. FRANKLIN

*Proctors for Appellant*



No. 12755

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IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

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FIREMAN'S FUND INSURANCE CO., a Corporation,  
*Appellant,*

vs.

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased, and UNITED  
STATES OF AMERICA,

*Appellees,*

JAMES G. MULROY, as Administrator of the Estate  
of Oscar Carl Johnson, Deceased,

*Appellant,*

vs.

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UNITED STATES OF AMERICA,

*Appellees.*

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

HONORABLE PEIRSON M. HALL, *Judge*

---

**BRIEF OF APPELLEE**  
**UNITED STATES OF AMERICA**

---

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FILED





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HONORABLE PEIRSON M. HALL, *Judge*

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**BRIEF OF APPELLEE**  
**UNITED STATES OF AMERICA**

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**STATEMENT OF THE CASE**

The statement of the case in the brief of the  
appellant, Fireman's Fund Insurance Company, is  
an adequate presentation of the facts.



## QUESTIONS PRESENTED

1. Whether the finding of the court that the insured's death was due directly and proximately to a war risk within the coverage of the policy issued by the Fireman's Fund Insurance Company was clearly erroneous.

2. Whether the Administrator of the insured may bring suit against the United States under a Second Seaman's War Risk Policy.

3. Whether the decisions of the Administrator of the War Shipping Board under the automatic Second Seaman's War Risk Policy is final and conclusive.

## SUMMARY OF ARGUMENT

The Administrator of the estate of the insured has a cause of action against the Fireman's Fund Insurance Company which insured the deceased seaman against war risks. The court below held that the death of the insured was caused proximately by his imprisonment and hence within the coverage of the policy. There was ample evidence to sustain this finding.

The United States is liable, if at all, under the automatic insurance of the Second Seaman's War

Risk Policy, only if the Fireman's Fund Insurance Company's policy did not cover the seaman's death. In any event, the administrator of the estate of the insured has no capacity to sue the United States since the Second Seaman's War Risk Policy provides that the proceeds of the insurance may go only to certain named beneficiaries and prohibits payment to the insured's estate.

Finally, there can be no recovery against the United States since the Administrator of the War Shipping Board found that the beneficiary of the policy was not a dependent of the insured. Decisions of the Administrator are made final and conclusive by statute and the requirement of dependency is a reasonable one under automatic insurance and not arbitrary or capricious.

## ARGUMENT

### I

THE ADMINSTRATOR OF THE ESTATE OF THE INSURED MAY NOT SUE FOR THE PROCEEDS OF A POLICY WHICH IS PAYABLE TO THE INSURED'S BENEFICIARY.

The libellant herein is the administrator of the estate of Oscar Carl Johnson, the deceased seaman,

and he brings the suit against the United States in his capacity as administrator.

Article 7 of the Second Seamen's War Risk Policy (Code of Federal Regulations, 1943 Supplement, Title 46, Chapter 3, App. A, pages 2129-30) provides in pertinent part:

"A. The insurance shall be payable only to a lawful widow or widower, child (the latter term including a posthumous child, a child legally adopted by the insured, and, if designated, a child in relation to whom the insured stood in *Loco parentis*, and a stepchild or acknowledged illegitimate child), parent (including a step-parent, parent by adoption and, if designated, a person who stood in the place of a parent to the insured), brother or sister (including, if designated, step-brothers or step-sisters, half-brothers and half-sisters, and brothers and sisters by adoption), grandparents, grandchildren, and, if designated, nephews, nieces, aunts or uncles, of the insured.

\* \* \*

(3) If the insured fails to designate a beneficiary or if the beneficiary or beneficiaries, whether primary or contingent, die before the insurance or any portion thereof shall be paid, the insurance will, subject to the provisions of paragraph B hereof, be paid to the beneficiary or beneficiaries within the following classes and in the order named:

\* \* \*

(c) If the insured shall have no lawful widow or widower of him or her surviving but shall have a child or children of him or her sur-

viving, 100 per cent to the child or children in equal shares.

\* \* \*

B. The right of any beneficiary to payment of the insurance, or any unpaid installment thereof, shall be conditioned upon his or her being alive to receive payment. No person shall have a vested right to any such insurance or any installment of any such insurance. *No insurance shall be paid to the heir or heirs or executors or administrators of the insured or of any beneficiary.*" (Italics supplied)

It is thus apparent that the Second Seamen's War Risk Policy not only directs payment of the insurance proceeds to certain designated beneficiaries but expressly prohibits payment to the administrator of the estate of the insured. The courts have often held that where the proceeds of an insurance policy are payable to a beneficiary, the administrator of the estate of the insured has no capacity to sue and on that ground his complaint will be dismissed. *Lee v. United States*, 101 F. (2d) 472; *Gordon v. United States*, 37 F. (2d) 925; *United States v. Boshar*, 91 F. (2d) 264. In *United States v. Lee*, supra, the administrator of the estate of the insured brought an action under Section 516, Title 38 U.S.C.A., which provided:

" \* \* \* That insurance hereafter revived under this section and section 516b of this title by reason of permanent and total disability or by

death of the insured, shall be paid only to the insured, his widow, child, or children, dependent mother or father, and in the order named unless otherwise designated by the insured, during his lifetime or by last will and testament. \* \* \*

The court dismissed the complaint holding that the administrator had no capacity to sue. The court said, after analyzing the statute and its legislative history, "This history shows that it was the clear intent of the Congress that only living persons were to be beneficiaries, and that no estate should be a beneficiary under this section. The omission of any reference to payment to an estate indicated that the privileges of the section were not intended for any other than the beneficiaries named in the class. Cf. *United States v. Madison*, 300 U.S. 500, 57 S. Ct. 566, 81 L. Ed. 767." (P. 474).

The contract of the Fireman's Fund Insurance Company in its policy was with "the assured, their Executors and Administrators" (Aps. 47). The insured did not designate a beneficiary and hence the proceeds of that policy are payable to the administrator of the estate of the insured. The administrator, therefore, may properly bring suit against the Fireman's Fund Insurance Company. With respect to the Second Seamen's War Risk Policy, however, the failure of the insured to designate a beneficiary

makes the proceeds of the policy payable, under Article 7, *supra*, to the insured's daughter Betty Jane Johnson Grant, and she alone can bring suit under the policy against the United States. She should, therefore, have been made a party to the action as permitted by Section 1128(d), Title 46 U.S.C.A., "All persons having or claiming to have an interest in such insurance, or who it is believed might assert such an interest may be made parties to such suit, either initially or upon motion of either party."

Since the administrator had no right to the proceeds of the Second Seamen's War Risk Policy, he had no capacity to sue, therefore, and his libel against the United States was properly dismissed.

## II

THE UNITED STATES IS NOT LIABLE ON THE SECOND SEAMEN'S WAR RISK POLICY SINCE THE DECEASED SEAMAN WAS ADEQUATELY PROTECTED BY THE POLICY ISSUED BY THE FIREMAN'S FUND INSURANCE COMPANY.

It is conceded by the libellant that the United States may be liable under the Second Seaman's War Risk Policy only if the deceased seaman did not have adequate coverage under the policy issued by



the Fireman's Fund Insurance Company (Aps. 72). The purpose of the Clarification Act (Section 1292, Title 50, War Appendix, Public Law 17, Chapter 26,) was to provide protection from war risks for seamen and their dependents who were "not otherwise adequately provided for." There is no question but that the Clarification Act was not intended to provide insurance additional to the private insurance which the seaman might have. If, then, it is determined that the Fireman's Fund policy covered the particular risk of war which resulted in the seaman's death, the United States cannot be liable on the Second Seamen's War Risk Policy.

The court below found that the death of Oscar Carl Johnson was a direct and proximate result of the warlike acts of the enemy Japanese and of the treatment suffered by the said seaman while a prisoner of war.

It is a well-established principle of admiralty law that the findings of fact by a trial court will not be disturbed unless clearly erroneous.

*Blake v. W. R. Chamberlin & Co.*, 176 F. (2d) 511 (C.C.A. 9);

*Fiamengo v. The San Francisco et al*, 172 F. (2d) 767 (C.C.A. 9);

*Hodges v. Standard Oil Co. of New Jersey*, 123 F. (2d) 362 (C.C.A. 4);

*Crist v. United States War Shipping Admin.*,  
163 F. (2d) 145 (C.C.A. 3);

*Virgin v. United States*, 165 F. (2d) 81  
(C.C.A. 4).

In *Blake v. W. R. Chamberlin & Co.*, *supra*, the court said:

In admiralty strong effect will be accorded the conclusion of the court from substantial evidence given by witnesses in court and weight will be accorded the court's conclusion where part of the evidence is by witnesses in court and part by depositions.

The case in the District Court at bar was not decided on depositions alone, but by depositions and the testimony of witnesses. The testimony of Dr. Frederick Slyfield (Aps. 94-104) was crucial to the determination of the issue of the proximate cause of death. The exception to the rule argued on pages 6 - 7 of appellant's brief is therefore, inapplicable to the instant case. Dr. Slyfield testified that if a rib resection operation could have been performed on the seaman under normal conditions he would have had a two to one chance of recovery. (Aps. 99) Carl Olaf Dreyer the Master of the CAPILLO testified that he lost nearly 60 pounds in weight, from 180 to 121 pounds, while a prisoner due to malnutrition. In the face of this testimony it can hardly be said that the finding of the District Court Judge, to the

effect that the death of Johnson resulted directly from his imprisonment was clearly erroneous.

### III

THE DECISIONS OF THE WAR SHIPPING ADMINISTRATION UNDER THE AUTHORITY LODGED IN IT TO DETERMINE COVERAGE UNDER SECOND SEAMEN'S WAR RISK POLICIES INVOLVE THE EXERCISE OF DISCRETION AND ARE NOT SUBJECT TO REVIEW BY THE COURTS.

The Merchant Marine Act of 1936 (Sections 1128 to 1128h, inclusive, Title 46 U.S.C.) is the basic statutory authority for granting insurance benefits to crew members of American vessels. Subsections (d) and (e) of Section 1128a and subsection (a) of Section 1292, Title 50, U.S.C. define the insurance benefits which the United States Maritime Commission is authorized to write for and on behalf of the masters, officers and crew members of American vessels. Subsection (b) of Section 1292, Title 50 U.S.C. apparently extends the provisions of the Second Seamen's War Risk Policy to seamen suffering casualties prior to adoption of the policy in March 1943. It provides that insurance under the Merchant Marine Act of 1936, as amended by Subsection (a) of Section 1292, may be extended in the discretion

of the Administrator of the War Shipping Administration to masters, officers and members of the crew of American vessels for death, detention or other casualties suffered by them for the period from October 1, 1941, and before thirty (30) days after the date of the enactment of the subsection, which was enacted March 24, 1943.

The insurance authority conferred upon the Maritime Commission by the foregoing acts was transferred to the War Shipping Administration and the Administrator thereof by Executive Order No. 9054, promulgated February 7, 1942, as amended by Executive Order No. 9244, issued September 16, 1942, and by the provisions of Section 1295, Title 50 U.S.C. (Act of March 24, 1943, Chapter 26, Section 5, 57 Stat. 51). Since the promulgations of Executive Order No. 9054 the War Shipping Administration and the Administrator thereof have been charged with the sole authority and responsibility in administering all matters relating to merchant seamen's insurance benefits.

Section 1292(b), Title 50 U.S.C.A. provides that "The declarations, findings, and actions of or by the Administrator under this subsection shall be final and conclusive." Article 10 of the Second Seamen's War Risk Policy provides: "Unless extended by the

provisions hereinafter contained, payment of the insurance for losses established in a manner *satisfactory to the Administrator or the Maritime War Emergency Board.*" (Emphasis supplied) Article 11 provides, "The time and facts of death of any insured shall be established in a manner *satisfactory to the Administrator.*" (Emphasis supplied.)

It is thus apparent that Congress intended to lodge complete discretion in the Administrator to determine coverage under the Second Seamen's War Risk Policy. It is well settled that where a statute makes the decisions of an administrative agency final and conclusive, the courts will not review the agency's decisions, at least when they are not arbitrary and capricious.

*Silberschein v. United States*, 266 U.S. 221;  
*Dismuke v. United States*, 297 U.S. 167.

It should be emphasized that the protection granted under the Clarification Act (Sec. 1292(b)) is automatic and gratuitous, the seaman paying no premium for the policy. Furthermore, the coverage is made retroactive to voyages begun before the passage of the Act, "if the Administrator finds that such action is required to make equitable provision for loss or injury related to the war effort and not otherwise adequately provided for." Under such cir-



cumstances, no property or constitutional right of the seaman is invaded in delegating to the Administrator alone authority to make decisions as to coverage.

By memorandum decision, dated July 7, 1943, the Administrator promulgated the following policy with respect to death claims under the Second Seamen's War Risk Policy:

- "3. Death cases must involve the existence of a bona fide relationship between the deceased and the beneficiary within the limits specified in Article 7 of the Second Seamen's War Risk Policy, and no payment shall be made to a person who fails to qualify under that Article. If the seaman involved has named as a beneficiary under the crew war risk insurance in force at the time of loss a person within said limits, payment shall be made to such designee, dependency being presumed, otherwise payment may be made to any person within such limits who is proven to be a bona fide dependent. In the event there is more than one dependent within such limits the distribution of benefit among such dependents shall be guided by the provisions of Article 7 A (3) of the Second Seamen's War Risk Policy. In the absence of either a valid designee or proven dependency, payment may be made to any person within said limits with whom the seaman made his home, dependency being presumed. Any findings made by the Administrator leading to payment as aforesaid shall be deemed conclusive as against all claimants."



In accordance with the above-quoted policy, the Administrator denied the claim of the beneficiary on the ground that she was not a dependent of the insured. The discretion thus exercised by the Administrator in limiting the benefits of automatic, gratuitous insurance is in accordance with the intent of Congress as appears from the report of the Senate Committee on Commerce, page 213, U.S. Code, Congressional Service, 78th Congress, 1st Session, 1943, wherein it is stated:

“Insurance protection for seamen — Another problem primarily affecting *seamen and their dependents* is the need of providing more complete protection to *seamen and their dependents* in case of loss or bodily injury to such seamen \* \* \*.” (Italics supplied)

Thus, assuming arguendo, that the Fireman's Fund Insurance Company is not liable on its policy, the administrator of the estate of the insured cannot recover against the United States since the Administrator of the War Shipping Board has determined in the exercise of the discretion delegated to him by law that the beneficiary is not a dependent of the insured and hence, not within the coverage of the Second Seamen's War Risk Policy.

## CONCLUSION

For the reasons mentioned, it is respectfully submitted that the libel was properly dismissed against the United States and that the judgment of the court should be affirmed.

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*Attorney, Department of Justice.*



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**United States Court of Appeals**  
**For the Ninth Circuit**

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FIREMAN'S FUND INSURANCE Co., a Corporation,  
*Appellant,*

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Estate of Oscar Carl Johnson, Deceased, and  
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UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT OF THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

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**BRIEF OF APPELLEE AND CROSS-APPELLANT**  
**JAMES G. MULROY, AS ADMINISTRATOR OF**  
**THE ESTATE OF OSCAR CARL JOHNSON,**  
**DECEASED**

---

JAMES G. MULROY,  
*Proctor for Appellee and*  
*Cross-Appellant.*

1717 Smith Tower,  
Seattle 4, Washington.



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# United States Court of Appeals

## For the Ninth Circuit

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No. 12755

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*Cross-Appellant,*

vs.

FIREMAN'S FUND INSURANCE Co., a Corporation, and UNITED STATES OF AMERICA,  
*Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

### BRIEF OF APPELLEE AND CROSS-APPELLANT JAMES G. MULROY, AS ADMINISTRATOR OF THE ESTATE OF OSCAR CARL JOHNSON, DECEASED

### JURISDICTION

Jurisdictional recital and statement of the case, contained in the brief of appellant Fireman's Fund Insurance Co., are believed by this appellee to be substantially correct and to conform to the allegations of appellee and cross-appellant's libel.

## QUESTIONS PRESENTED

(1) If a *war prisoner* dies from illness while in enemy custody because of detention by his captor, hardships of imprisonment, or because the captor has deprived medical attendants of instruments or facilities needed for his effective treatment, is the death a proximate result of capture?

(2) Upon what contingency does liability, if any, accrue against the United States of America as a party litigant herein under Second Seamen's War Risk Act, where, at the time of death resulting from an act of war, a seaman was covered by commercial war risk insurance?

(3) When a war risk insurance policy has matured and become payable owing to the death of the insured under its terms, at what times does the principal sum of the insurance begin to bear interest?

## WEIGHT TO BE ATTACHED TO FINDINGS OF THE TRIAL COURT

Inasmuch as most of the evidence presented was documentary, uncontroverted and in fact generally admitted by all parties involved in this action, the trial court's findings, based thereon, should properly be considered to be factually conclusive. Regarding oral testimony offered at the trial of this case, contrary to argument of appellant Fireman's Fund Insurance Co. (Appellant's Brief 6), the evidence of Dr. Slyfield, called as a medical expert, was controverted under cross-examination (Aps. 98-101) as well as by the attending physician's report, which was ad-

mitted in evidence without appellant's or other objection (Aps. Ex. 1, pp. 44-46).

Mr. Johnson's attending physician, Dr. Hugh Robinson, who treated him in the Japanese interment camp in or near Manila, reported (Aps. 46) that on or about February 7, six months before the decedent's death, no treatment would be effective except a surgical operation referred to as a "lobectomy." Although the leading thoracic surgeon in the Philippine Islands was available to perform this operation, the circumstances were such that he would not consider doing it because he had been deprived of some of his equipment (Aps. 46). On direct examination at the trial of this case, Dr. Slyfield, called as an expert witness (who was not a surgeon, but was a physician specializing in the United States in the same medical field as Johnson's attending physician, Dr. Robinson), diagnosed the medical case of a man who at the time of his diagnosis was deceased more than seven years, and whom he had never seen or examined; and Dr. Slyfield testified in one instance (Aps. 97) that in 75% of lung abscess cases the patient died, otherwise stated, one in four survived. In his testimony he also described an operation, used in lung abscess surgery, which on cross-examination (Aps. 99) turned out not to be a lobectomy at all. Also on cross-examination he admitted that there is no similarity between the surgical procedure he had described (Aps. 97) and later called a rib resection (Aps. 101), and a lobectomy.

Further, Dr. Slyfield, still being cross-examined, corrected his sights and took a second guess on the



mortality rate in lobectomy operations, and he then agreed that a patient's chance of survival therefrom was two to one (Aps. 99). According to this expert's testimony also, penicillin appears to have some potency or influence in medical treatment of lung abscess, since, he states that *prior* to its advent patients had a two to one chance of surviving the rib resection operation. No mortality figures, however, were given by this expert, in reference to the success of medical practice along this line *subsequent* to the advent of penicillin, which came into general use and was available in the United States in the year 1943, although just what part of that year Dr. Slyfield was "not sure about." In short, the doctor, who apparently was quite familiar with and definite as to the technical use (and retail price) of this comparatively new medicine (often referred to in current literature as a wonder drug), was unable, except vaguely, to fix a date when it became generally available in hospitals and to general medical practitioners in the United States (Aps. 100).

#### DECEDENT'S DEATH DUE TO WAR RISK

As asserted by appellant, the evidence in this case demonstrates that decedent seaman died August 6, 1943, of illness contracted before his interment in a Japanese prisoner of war camp.

It is to be noted, however, that Johnson signed articles for a voyage on the SS "Capillo," which was to terminate 100 days from its commencement, October 14, 1941, and, except for the destruction of the vessel in Manila Harbor by warlike acts of the enemy Jap-

anese then (December 29) at war with the United States, he would, under normal peacetime circumstances, have returned with his ship to the United States, approximately by April 1, 1942, where all necessary medical facilities, including penicillin, hospital care and all necessary instruments were, or would have been, available for the effective treatment of his condition.

### **SUMMARY OF ARGUMENT BY APPELLEE AND CROSS-APPELLANT**

(1) Fireman's Fund Insurance Co. Policy No. 6922, issued October 17, 1941 (Aps. 47), was and is a valid war risk policy of insurance, which by its terms covered loss of life by Oscar Carl Johnson, deceased, and which became fully matured and payable upon his death, August 6, 1943, at which time he was a war prisoner in a Japanese interment camp in the Philippine Islands.

(2) Interest upon the proceeds of an insurance policy accrues at the time of its becoming a liquidated claim against the insurer.

(3) The United States of America as cross-appellee is a party properly liable in this action under the laws of the United States relating to seamen's war risk insurance policies, but only in the event that any liability under Fireman's Fund Insurance Co. Policy No. 6992 is finally determined to be invalid, inapplicable, or inadequate. In support of the foregoing Paragraph (3) the court's attention is referred to argument and citations contained in appellant's brief, pages 19 to 27, and therefore, that portion of said

brief is hereby adopted by this appellee and cross-appellant, save and except as the same may appear to be in conflict with the amended libel herein.

### WHAT ARE WAR RISKS ?

First of all this appellee and cross-appellant insists that none of the decisions in the cases cited in appellant's brief at pages 15 to 18, inclusive, are based upon any facts properly comparable to those found in the present case; and they are, therefore, here not in point. The test of this is, what would have been the court's decision in each of the cited cases had the subject seaman involved been captured and died in prisoner of war camp, from illness where the effective treatment thereof was prevented by the circumstances of their imprisonment and the pleasure of their captors.

Regarding Johnson's death, it is contended by this appellee and cross-appellant that its occurrence was not the result merely of illness, but only therefrom when the same was combined with his captivity.

There is no case mentioned in this action, or to be found elsewhere, which has either ruled or indicated that a man's capture and confinement as a prisoner of war, and his loss of liberty or life therefrom is not the result of a warlike act.

Also to be considered upon this subject are the following decisions in situations believed to be analogous to this.

*Runci v. United States*, 82 F.Supp. 523. Heart attack, fatal six days after discharge from ship. The court said:

"In the absence of any other cause for the sudden and fatal heart attack, I find that there was a close association between his death and his service."

*Crist v. United States*, 64 F.Supp. 934. Deceased, insured under 2nd Seamen's War Risk Policy, abandoned in life boat of unseaworthy sinking ship, because a nearby rescuing vessel feared submarine attack if she stood by.

"It would appear therefore that the death of Theodore W. Ellse was purely the result of a war risk or a warlike operation and not the result of a maritime peril.

"That cause is proximate which sets the other causes in motion."

*Sutton v. United States*, 73 F.Supp. 996. Sea captain had been for months subjected to "risks of war" while engaged in the Pacific Ocean within the Second Seamen's War Risk Policy. After heart attack captain's condition became so serious that he was confined to his bunk. The contract of insurance is predicated upon the amendment of March 24, 1943, to the Second Seamen's War Risk Policy, which reads:

"Art. III.—'Risks and Perils': The insurance is for loss of life \* \* \* of the insured directly and proximately caused by risks of war and warlike operations \* \* \* acts of kings, princes and peoples in the prosecution of hostilities \* \* \*."

*Shrader v. United States*, 180 F.(2d) 972. Murder of a seaman by insane soldier. "Proximate cause," for

purpose of determining liability under Second Seamen's War Risk Policy, is procuring and efficient cause not necessarily that which is last in time.

"Giving a liberal construction to Shrader's policy \* \* \* his death falls within its coverage."

## INTEREST PAYABLE FROM MATURITY OF POLICY

Under the laws of the State of Washington interest is properly payable upon a liquidated account from the date it becomes due.

Remington Revised Statutes of Washington, §7299, and appendix:

Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per cent per annum where no different rate is agreed to in writing between the parties.

An amount liquidated and payable carries interest under Remington Revised Statutes, §7299, in the absence of a contrary agreement, and a liquidated deferred balance of such a sum carries interest.

Words and Phrases, Vol. 25, page 338:

A demand is "liquidated" when the amount due or to become due is fixed by law or by agreement between the parties.

Washington Reports:

*Weaver v. General Metals*, 167 Wash. 451:

"The amount fixed in the contract was a definite sum."

*Barbo v. Norris*, 138 Wash. 627 (at 640):

"The amount due respondent was ascertained by a mere computation in which case interest is always allowable from the time the account accrued."



*Hansen & Rowland v. Lytle Co.*, 167 F.(2d) 170.

Cyclopedia of Insurance Law, Vol. 7, page 6186, par. 1865:

“As a general rule, the insurer is liable for interest from the time the policy becomes payable; that is from the date when the right of action first accrued according to the conditions of the policy, or when the amount payable has been made certain and has become due \* \* \*.”

Appellant in its brief, pages 28 to 32, claims exemption from payment of interest because of alleged failure by appellee to press this action to trial. The fact is, however, that there were never any delays in the prosecution of this suit to which the defendants were not entirely agreeable, and they were always acting in their own interest fully as much as for the benefit of the present appellee. Examination of the record will reveal that answers to the amended libel were only filed by Fireman's Fund Insurance Co. upon August 7, 1950, eight days before the trial date, and the answer of the United States of America was not filed until June 24, 1949, more than three years after commencement of the action.

Also, in this connection it should be borne in mind that under Washington State law this suit would have been timely if commenced at any time within six years after August 6, 1943.

### SUMMARY

Appellee and cross-appellant now respectfully prays that the decree of the trial court be so modified as to grant to him a judgment in the sum of \$5,000.00



against either the Fireman's Fund Insurance Company or the United States of America, whichever in the opinion of this court may be ultimately liable under the law and the facts in this case; and that such judgment shall be subject to interest thereon at six per cent per annum from August 6, 1943, until paid.

Respectfully submitted,

JAMES G. MULROY,  
*Proctor for Appellee and  
Cross-Appellant.*

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United States Court of Appeals  
For the Ninth Circuit

---

FIREMAN'S FUND INSURANCE Co., a Corporation,  
*Appellant,*

vs.

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased, and  
UNITED STATES OF AMERICA, *Appellees.*

---

JAMES G. MULROY, as Administrator of the  
Estate of Oscar Carl Johnson, Deceased,  
*Cross-Appellant.*

vs.

FIREMAN'S FUND INSURANCE Co., a Corporation,  
and UNITED STATES OF AMERICA, *Appellees.*

---

UPON APPEAL FROM THE UNITED STATES DISTRICT  
COURT OF THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

PETITION FOR REHEARING OF JAMES G. MULROY,  
AS ADMINISTRATOR OF THE ESTATE OF  
CARL JOHNSON, DECEASED

---

JAMES G. MULROY,  
*Proctor for Appellee and  
Cross-Appellant.*

3012 Arcade Building,  
Seattle 1, Washington.

JAN 31 1952



United States Court of Appeals  
For the Ninth Circuit

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# United States Court of Appeals

## For the Ninth Circuit

FIREMAN'S FUND INSURANCE Co., a Corporation,

*Appellant,*

vs.

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased, and UNITED STATES OF AMERICA,

*Appellees.*

No. 12755

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased,

*Cross-Appellant,*

vs.

FIREMAN'S FUND INSURANCE Co., a Corporation, and UNITED STATES OF AMERICA,

*Appellees.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING OF JAMES G. MULROY,  
AS ADMINISTRATOR OF THE ESTATE OF  
CARL JOHNSON, DECEASED

To: The Honorable Judges of the United States Court of Appeals, Ninth Circuit:

With reference only to reversal of judgment against Fireman's Fund, the undersigned petitioner hereby respectfully petitions for rehearing of the above entitled cause, heretofore heard by this court September 13, 1951, and decided January 2, 1952, upon appeal



from a judgment of the District Court of the United States, Western District, Northern Division, dated August 31, 1950, in Admiralty Cause No. 14918, upon the following grounds::

It appears to petitioner, that the Court of Appeals has decided he is not entitled to recover judgment against defendant, Fireman's Fund, because:

- a. Payment for losses if any, under war risk insurance policy No. 6622, issued by said company was payable solely to American Mail Line, Ltd., for distribution by it in *accordance with agreement made with each seaman concerned*.
- b. Your petitioner was not a seaman as mentioned, and had no capacity as personal representative of a deceased seaman or otherwise, to recover judgment under said policy, against Fireman's Fund, regardless of any insurance coverage effected by that policy.
- c. Petitioner's pleadings were defective as to parties, American Mail not having been made a party to the action brought against Fireman's Fund to recover insurance proceeds upon loss of life by Oscar Carl Johnson, a deceased seaman.

### Discussion

The above indicated defense was never tendered in the trial court by Fireman's Fund, its apparent theory being that under the policy there might be a liability payable to the deceased seaman's personal representative or next of kin, had not Johnson ceased to be a member of the "Capillo's" crew prior to destruction of that vessel, but that in any event, his death was not due to war perils covered by the policy.

Fireman's Fund, itself, never challenged the libel, or joined in any challenge thereto either as to petitioner's capacity to sue, or as to any defect of parties in this litigation, and it is petitioner's present contention that these matters may not now properly be brought in or considered upon appeal.

It should be noted, that the contract entered into under shipping articles between American Mail and the crew of the "Capillo" provided, among other things (listed in rider, Appellant's Exhibit No. 3) that the steamship company was obligated to "carry" war risk insurance against loss of life as a result of war perils. Policy No. 6622 was procured in compliance with that provision, and under it Fireman's Fund specifically took "*upon itself the burden of such insurance \* \* \**" (Ap. 47), but at all times since Johnson's death the insurer has disclaimed responsibility thereunder, has refused to pay anything either to American Mail or otherwise, and instead has defended in this litigation upon grounds other than petitioner's presently alleged incapacity to sue, or defects in parties here impleaded.

The court's present ruling that payment for losses under Policy No. 6622 cannot be enforced by a personal representative or heir at law of an insured deceased seaman whose death was or many have been, covered by the contract of insurance, effectively destroys the contract between Johnson and American Mail, created by the shipping articles and rider thereto.

Your petitioner recalls no evidence in reference to what, if any agreement, was executed between John-

son and American Mail for distribution of insurance proceeds in the event of Johnson's death. Inasmuch as American Mail has no interest in any funds payable to it upon maturity of Policy No. 6622, its legal status thereon is no more than that of prospective, or contingent trustee, to receive and distribute to the assured, or ultimate payees, such money as might come into its possession from payments made by Fireman's Fund, upon deaths due to war perils, of insured members of the "Capillo's" crew, for the benefit either of their estates, next of kin or other designated beneficiaries. Because of that situation, American Mail was not a necessary party litigant in this action. To enforce payment, any beneficiary under a matured employee's group life insurance policy may bring suit directly against the insurer. This seems particularly true where an insurer, in terms of its policy, has taken upon itself the burden of insurance, and thus, by implication at least, has relieved the employer of responsibility therefor.

In this matter your petitioner further respectfully, but urgently, requests this Honorable Court that he be permitted to file herein a brief in which more detailed argument and citation of legal authority to support his present petition may be fully presented.

Respectfully submitted,

JAMES G. MULROY,  
Petitioner.

**CERTIFICATE**

I, the undersigned petitioner, and counsel for petitioner hereby certify that in my judgment the foregoing petition is well founded, that it is seriously presented for consideration and is not interposed for delay.

JAMES G. MULROY,

Petitioner and Attorney for Petitioner.



No. 12756

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United States  
Court of Appeals  
for the Ninth Circuit.

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CLARK SQUIRE, Collector of Internal Revenue,  
Appellant,

vs.

STUDENTS BOOK CORPORATION,  
Appellee.

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Transcript of Record

---

Appeal from the United States District Court,  
Western District of Washington,  
Southern Division





No. 12756

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United States  
Court of Appeals  
for the Ninth Circuit.

---

CLARK SQUIRE, Collector of Internal Revenue,  
Appellant,

vs.

STUDENTS BOOK CORPORATION,  
Appellee.

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Transcript of Record

---

Appeal from the United States District Court,  
Western District of Washington,  
Southern Division



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## ATTORNEYS OF RECORD

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Seattle, Washington,

Attorneys for Defendant-Appellant.





In the District Court of the United States for the  
Western District of Washington, Southern Division

No. 1226

STUDENTS BOOK CORPORATION,

Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,

Defendant.

### COMPLAINT

Plaintiff alleges:

#### I.

This action arises under section 1340 of Title 28 of the United States Code as hereinafter more fully appears.

#### II.

Plaintiff is, and at all times hereinafter mentioned was, a corporation organized under the laws of the State of Washington, having its principal place of business at Pullman, Washington, and has paid its last annual license fee due the State of Washington. It is engaged principally in the business of supplying text books and student accessories to the students of the State College of Washington.

#### III.

Defendant is, and at all times material hereto was, United State Collector of Internal Revenue for the District of Washington, and all taxes hereinafter

mentioned were paid to defendant by plaintiff pursuant to demand therefor made by defendant.

#### IV.

At all times material hereto, prior to March 1, 1947, plaintiff corporation was controlled and all of its stock was owned and held by the Associated Students of the State College of Washington, a nonprofit corporation organized under the laws of the State of Washington, and at all times subsequent to March 1, 1947, all of said stock and the control of plaintiff corporation have been held by the Board of Regents of the State College of Washington, pursuant to a trust agreement between said Board of Regents and the Associated Students of the State College of Washington, whereby the principal and net earnings of the trust shall be used only in furtherance of the purposes for which the Associated Students of the State College of Washington is organized.

#### V.

The State College of Washington is, and at all times herein mentioned was, an educational institution owned and operated by the government of the State of Washington and administered by a Board of Regents appointed pursuant to the laws of said state. The Associated Students of the State College of Washington is, and at all times material hereto was, a nonprofit corporation having a membership composed of students currently enrolled in the State College of Washington and functioning under the authority of the Board of Regents of said College as an educational association, having for its purposes

the furthering and supplementing of the activities of said State College of Washington and has heretofore been recognized by the Commissioner of Internal Revenue of the United States as exempt from federal income taxes as an educational institution. Neither the Students Book Corporation nor the Associated Students of the State College of Washington has at any time been engaged in the carrying on of propaganda or otherwise attempting to influence legislation.

## VI.

At all times material hereto all of the net earnings of the Student Book Corporation have inured to the benefit of the Associated Students of the State College of Washington or the State College of Washington, and no private individual or shareholder has at any time in the past, nor will in the future, receive any portion of the net earnings of the Students Book Corporation.

## VII.

Plaintiff has heretofore paid to defendant as Collector of Internal Revenue, pursuant to demands made by defendant, the following taxes:

Year	Nature of Tax	Date Paid	Amt. Paid
1943	Corporate Income Tax	Mar. 15, 1944	\$ 4,760.48
		June 15, 1944	
		Sept. 15, 1944	
		Dec. 15, 1944	
1943	Corporate Declared Value Excess Profits Tax	Mar. 15, 1944	349.84
		June 15, 1944	
		Sept. 15, 1944	
		Dec. 15, 1944	
1943	Excess Profits Tax	Mar. 15, 1944	13,735.26
		June 15, 1944	
		Sept. 15, 1944	
		Dec. 15, 1944	

Year	Nature of Tax	Date Paid	Amt. Paid
1943	Capital Stock Tax	July 31, 1943	375.00
1944	Corporate Income Tax	Mar. 15, 1945	
		June 15, 1945	4,840.07
		Sept. 15, 1945	
		Dec. 15, 1945	
1944	Capital Stock Tax	July 31, 1944	250.00
1945	Corporate Income Tax	Mar. 15, 1946	
		June 15, 1946	5,626.31
		Sept. 15, 1946	
		Dec. 15, 1946	
1945	Capital Stock Tax	July 31, 1945	250.00
1946	Corporate Income Tax	Mar. 15, 1947	
		June 15, 1947	14,159.53
		Sept. 15, 1947	
		Dec. 15, 1947	
1947	Corporate Income Tax	Mar. 15, 1948	
		June 15, 1948	27,586.66
		Sept. 15, 1948	
		Dec. 15, 1948	
Total Payments.....			\$71,933.15

Plaintiff filed with defendant claims for refund of all taxes listed above for the years 1943, 1944 and 1945 on March 13, 1947. Plaintiff was notified of the rejection of each of said claims for refund by letter dated September 27, 1948, signed by E. J. McLarney, Deputy Commissioner of Internal Revenue. Claims for refund of the amounts shown above for the years 1946 and 1947 were filed with defendant by plaintiff in June, 1948, but plaintiff has not been advised of any action on said claims to this date.

### VIII.

Plaintiff has at all times been operated exclusively for an educational purpose and all of the amounts above shown as paid by plaintiff were erroneously collected by defendant.

Wherefore, Plaintiff prays for judgment against defendant in the sum of \$71,933.15, together with plaintiff's costs and disbursements incurred herein.

/s/ SMITH TROY,

Attorney General of the  
State of Washington.

/s/ LYLE L. IVERSEN,

Assistant Attorney General of the State of Washington, Attorneys for Plaintiff.

State of Washington,  
County of Whitman—ss.

Jack E. Downen, being first duly sworn, says: I am president of the Students Book Corporation and am authorized to make this verification on its behalf. I have read the foregoing complaint, know the contents thereof and believe the same to be true.

/s/ JACK E. DOWNEN.

Subscribed and Sworn to before me this 29th day of March, 1949.

[Seal] /s/ C. L. HIX,

Notary Public in and for the State of Washington,  
Residing at Pullman.

[Endorsed]: Filed April 7, 1949.



[Title of District Court and Cause.]

## ANSWER

Defendant, Clark Squire, Collector of Internal Revenue for the District of Washington, by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington; Harry Sager, Assistant United States Attorney for said district, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, for answer to the complaint of plaintiff admits, denies and alleges.

### I.

Defendant admits the allegations contained in paragraph of the complaint numbered I.

### II.

Defendant admits that plaintiff is a corporation organized under the laws of the State of Washington, having its principal place of business at Pullman, Washington, as alleged in paragraph of the complaint numbered II.

For lack of knowledge or information sufficient to form a belief defendant denies each and every other allegation contained in said paragraph numbered II.

Defendant alleges that the purposes for which plaintiff was formed were "to carry on a general book, stationery, sporting goods, refreshment and general mercantile business, to buy and sell real estate, to engage in a general insurance business," and that at all times material hereto plaintiff has

carried on most, if not all, of its stated purposes for organization.

III.

Defendant admits the allegations contained in paragraph of the complaint numbered III.

IV.

Defendant admits the allegations contained in paragraph of the complaint numbered IV, except that defendant specifically denies that it was at any time material hereto "controlled" either by the Associated Students of the State College of Washington, or by the Board of Regents of the State College of Washington.

Further answering, defendant alleges that plaintiff was organized and operated as a separate legal entity for its own business purposes and not for educational purposes; that plaintiff at all times material hereto was managed, operated and controlled by its own officers, trustees and stockholders. That plaintiff at no time has been an auxiliary to or an integral part of the Associated Students of the State College of Washington or of the State College of Washington.

V.

Defendant admits the allegations contained in paragraph of the complaint numbered V, except that defendant specifically denies that Associated Students of the State College of Washington functioned under the authority of the Board of Regents of State College of Washington as an educational institution.

## VI.

Defendant denies the allegations contained in paragraph of the complaint numbered VI.

## VII.

Defendant admits the allegations contained in paragraph of the complaint numbered VII.

## VIII.

Defendant denies the allegations contained in paragraph of the complaint numbered VIII.

Wherefore, defendant prays judgment that this action be dismissed, together with costs and disbursements to defendant.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the Chief Counsel, Bureau of  
Internal Revenue.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 29, 1949.

[Title of District Court and Cause.]

## STIPULATION

It is hereby stipulated by and between the plaintiff, through its attorneys, Smith Troy, Attorney General for the State of Washington, and Lyle L. Iversen, Assistant Attorney General for the State of Washington, and the defendant, by and through his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, that the following facts are admitted and may be taken and deemed by the Court at the trial of this action as established facts therein:

### I.

This action arises under Sec. 1340 of Title 28, United States Code.

### II.

Plaintiff is, and at all times hereinafter mentioned was a corporation organized under the laws of the State of Washington, having its principal place of business at Pullman, Washington, and has paid its last annual license fee due the State of Washington.

### III.

Defendant is, and at all times material hereto was the United States Collector of Internal Revenue for the District of Washington, and all taxes hereinafter mentioned were paid to defendant by plaintiff pursuant to demand thereof made by defendant and

the same were paid by said defendant into the Treasury of the United States.

#### IV.

Exhibit 1, hereto attached, is a true copy of the Articles of Incorporation of the plaintiff corporation in their present amended form.

#### V.

Exhibit 2, hereto attached, is a true copy of the By-Laws of the plaintiff corporation in their amended form, at all times material hereto prior to November 4, 1948.

#### VI.

The plaintiff, Students Book Corporation, succeeded in 1923 to the Student Book Company, Inc., a corporation organized in 1914 by the Associated Students of the State College of Washington, hereinafter referred to as the A.S.S.C.W., which supplied the original capital in the sum of \$2,000. The said College of Washington is an educational institution operated by the Government of the State of Washington and is, for the most part, supported by public funds. The A.S.S.C.W. is a corporation organized under the laws of the State of Washington, and Exhibit 4, attached hereto, is a true copy of its Articles of Incorporation. Exhibit 5, attached hereto, is a true copy of the Constitution of the A.S.S.C.W.

#### VII.

The A.S.S.C.W. has been recognized by the Commissioner of Internal Revenue as exempt from Fed-

eral income taxes under Sec. 103(6) of the Revenue Act of 1928, and Sec. 231(6) of the Revenue Act of 1926, according to a letter from the Commissioner of Internal Revenue to the corporation dated July 14, 1930.

### VIII.

The plaintiff corporation for many years has operated a store on its own property adjoining the campus of the State College of Washington. The property was purchased in 1923 and a new building was erected. The building was financed by a mortgage loan of \$22,000, and which was paid off by profits from its business in 1928. The original charter of the corporation provided for an authorized capital of \$60,000. Capital stock in the amount of \$25,000 was issued to the A.S.S.C.W. in consideration for the assets of the Student Book Company, Inc., on May 1, 1923. In 1928 the authorized capital stock was increased to \$100,000. Stock dividends were paid from time to time to the A.S.S.C.W. until March 30, 1939, at which time the capital stock outstanding reached its present total of \$77,000. During the period up to 1929 all earnings were retained in order to provide working capital and finance the purchase of equipment and expansion of the plant. Capital stock and surplus during this period were as shown in the following Table I:



## "Capital Stock Issued and Surplus

Date	Description	Stock	Stock Outstanding	Surplus After Dividend
5- 1-23	Original Issue .....	\$25,000.00	\$25,000.00	\$9,646.12
1-28-26	Stock Dividend ....	20,000.00	45,000.00	1,947.22
1-15-27	Stock Dividend ....	10,000.00	55,000.00	1,141.76
10-31-27	Stock Dividend ....	1,000.00	56,000.00	141.76
6-30-28	Stock Dividend ....	7,000.00	63,000.00	5,102.63
3-30-29	Stock Dividend ....	14,000.00	77,000.00	3,643.59"

Thereafter, dividends were paid in cash to the A.S.S.C.W. as shown in Table II:

"Cash and Security Dividends Paid  
Jan. 1, 1933, to Dec. 31, 1945

1933.....	\$ 442.10
1934.....	500.00
1936.....	11,550.00
1937.....	7,700.00
1940.....	9,240.00
1941.....	9,240.00
1943.....	7,700.00
1944.....	11,550.00
1945.....	46,200.00"

## IX.

The dividends paid in 1933 and 1934 were earmarked in the resolution by which they were declared for specific purposes; first to finance a publication of the A.S.S.C.W. for distribution to students, and second, to finance a painting of President Emeritus E. A. Brian which was presented to the State College of Washington. With these exceptions, the Board of Trustees of the Students Book Corporation followed a dividend policy to make available funds for the building of a student union building adjacent to or on the present campus of the State College of Washington. The development of this policy started in 1929. The minutes of

the trustees' meeting of April 25, 1929, read as follows:

"Mr. Willman, store manager, suggested to the board that they give some thought to setting aside a part of each year's profit, to be invested in a fund to be used to help finance a student union building whenever such a building was constructed on this campus."

The minutes of April 14, 1937, contain the following:

"Q. Why hasn't the store distributed its earnings to the members of the student body as such earnings are made?

"A. The total outside investment made in the store is \$2,000. In 1914 the A.S.S.C.W. made this investment. If all the earnings since the store was first started had been returned to the students there would be no student store today, and it would have been impossible to continue operations with so small a capital structure. The store building, its equipment and its merchandise have now been paid for out of earnings and now earnings are being accumulated toward the building of a student union."

## X.

The board of trustees declared dividends at such times as the A.S.S.C.W. asked for money to implement the program for the construction of a student union building. These dividends were transferred to the bursar (now comptroller) of the State College

of Washington who, in turn, has disbursed these funds for the purchase of lands, title to which is vested in the State College of Washington and held for student purposes in accordance with resolution adopted by the Board of Regents October 10, 1941, as follows:

“Whereas, the Associated Students of the State College of Washington have purchased the following property to provide a sufficient and suitable site for a Student Union Building for this campus and title of which rests in the name of the State of Washington:

“To Wit, That part of lot five (5) in block three (3) of Campus Park Addition to Pullman, according to plat thereof recorded in Book E of plats, page 23, records of said county, described as follows:

“Commencing at the southerly point of said lot on Thatuna Street, and running thence northeasterly along the southerly line of said lot 192 feet to an iron stake; thence at right angles to said southerly line, to the northerly line of said lot; thence southwesterly along the northerly line of said lot; to Thatuna Street, thence southeasterly along Thatuna Street to the place of beginning.

“Lot twenty-four (24) of McGee’s Subdivision of Lots one (1) and two (2) of Section five (5), township 12 North, Range forty-five (45) E.W.M. together with all that portion of lot one (1), of Section five (5), township fourteen (14) North, Range 45, E.W.M. lying south and

west of said lot twenty-four (24) as now owned by the State of Washington.

“Be It Resolved, that the Board of Regents hereby recognizes the transfer of title of the above-mentioned real estate and that of any other purchases to be made in the future for the same purpose and hereby records in its minutes that said land will be held by the State College of Washington for student purposes; and, that in the event said land is required for other College uses, either suitable other land will be made available to the A.S.S.C.W. or payment will be made to the A.S.S.C.W. in the amount of cash expenditure made in purchasing said land.

“In Witness Whereof, the Board of Regents directs that this be spread on its minutes and that the Associated Students be notified of its action.”

Funds in excess of these disbursements were invested in marketable securities pending use in construction of a student union building. All dividends paid on the stock have been received by the A.S.S.C.W. including those paid on the trustees' qualifying shares.

All receipts by the A.S.S.C.W. from the Students Book Corporation have been used solely for the following purposes:

- (1) For real estate costing \$54,804.19 to which the State of Washington has title.
- (2) For drafting and securing plans for the

proposed student union building costing \$32,068.77.

These disbursements were made to the A.S.S.C.W. by the Students Book Corporation. A detailed list of the expenditures made by the A.S.S.C.W. for which they were reimbursed is attached hereto as Exhibit 6.

## XI.

Other disbursements made from these funds were in connection with the purchase of securities held by the comptroller in the students' store account, for maintenance and other operating costs connected with the renting of the property thus acquired. These costs have been charged to the fund as the rentals collected by the comptroller on this property have been deposited in the fund. Earnings which have not been paid in dividends have been retained by the Students Book Corporation to finance expansion of the store and are retained in liquid form prior to declaration of dividends to the A.S.S.C.W. The business of the Students Book Corporation is conducted primarily with the students and faculty of the State College of Washington. Approximately four per cent of the business of the store is done with persons other than those connected with the State College of Washington. The merchandise handled consists of textbooks and student supplies. The corporation has never passed a rebate to the students, faculty members or customers. A part of its stock is sold at list or current retail prices, and on certain items, such as



engineering and laboratory equipment prices, in many cases, are below list. Where the margin is so low as to require selling at list prices in order to break even, or on those lines which have a manufacturer's set list price, these items are sold at list price. The bookstore cooperates with the faculty of the college in stocking adopted textbooks, laboratory instruments and other items determined by the faculty to be necessary to students in pursuing courses of instruction.

The proposed student union building when constructed will be the property of the State of Washington.

## XII.

On February 27, 1947, the A.S.S.C.W. transferred to the board of regents of the State College of Washington all of the stock of the Students Book Corporation. A trust agreement dated March 1, 1947, setting forth the conditions of the transfer was entered into by the A.S.S.C.W. and the board of regents. A true copy of the trust agreement is hereto attached as Exhibit 7. The stock has been held in accordance with that trust agreement continuously to the present date.

## XIII.

During the taxable years involved in this action, the gross sales, gross profit from sales, income other than from sales, total income, salaries paid by and number of employees of Students Book Corporation were as follows:



Year	Gross Sales	Gross Profits From Sales	Income Other Than From Sales	Salaries Paid	No. of Employees
1943	\$272,605.46	\$ 77,637.50	\$ 3,876.14	\$31,359.05	80
1944	190,170.58	56,884.70	3,908.50	28,012.88	125
1945	220,797.36	63,502.99	3,382.69	31,298.03	137
1946	453,729.88	120,957.33	4,998.56	58,026.73	178
1947	741,373.68	203,513.38	16,824.94	95,407.70	371

The State College of Washington did not itself own any interest in Students Book Corporation, was not responsible for its debts, and was not entitled to any part of its earnings during any of the taxable periods involved in this action.

The Students Book Corporation, itself, does not instruct any students of the college, employed no teachers and offered no courses of study.

It is further stipulated and agreed that this case presents the following question:

Whether the Commissioner of Internal Revenue erred in refusing to allow the plaintiff corporation's claim of exemption from Federal income tax under Sec. 101(6) of the Internal Revenue Code (Title 26, U. S. C., 101(6)).

### Statute Involved

#### Internal Revenue Code

Sec. 101. Exemptions from Tax on Corporations.

The following organizations shall be exempt from taxation under this chapter:

\* \* \*

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary,

or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

\* \* \*

### Plaintiff's Contentions

Plaintiff contends that it is entitled to exemption from federal income tax and excess profits tax under the provisions of Section 101(6) of the Internal Revenue Code because:

(1) It is a corporation organized and operated exclusively for an educational purpose, the sole object of its organization having been to act as an implementing agency to the educational activities of the State College of Washington. During all of the taxable years involved and at all other times plaintiff has actually been operated in keeping with the purpose for which it is organized, and all profits have accrued directly to the State College of Washington and its educational activities, the principal destination of its net earnings having been the acquisition of land for a student union building, title to which has vested in the State College.

(2) No part of the net earnings of plaintiff have, during any of the taxable years involved, inured to any private individual, but all of its earn-

ings have gone to the advancement of the educational activities of Washington State College.

(3) Exemption is not determined by the form of the charter of a corporation, but by the actual facts with regard to its organization and activities and the destination of its income.

### Defendant's Contentions

Defendant contends that the plaintiff corporation is not entitled to exemption from Federal income tax under the provisions of Sec. 101(6) of the Internal Revenue Code, corresponding provisions of the Revenue Acts and the Regulations, because:

#### I.

In order to be exempt under the above-quoted section of the law, an organization must be both organized and operated exclusively for one or more of the specified purposes, and since the plaintiff corporation was organized for general business purposes, it can not be said to be organized and operated for any of the purposes specified in the statute.

#### II.

Neither the statute nor the regulations recognize that an organization is exempt from Federal income tax merely because its income is distributed to an exempt organization or is devoted to exempt purposes, and that neither does the ownership of the capital stock of a business corporation by an exempt organization entitle the corporation to exemption, although, through the stock ownership,

the exempt organization does, of course, exercise control over the affairs of the corporation.

It is further stipulated and agreed that the right of either party is reserved to introduce additional evidence.

/s/ SMITH TROY,

/s/ LYLE L. IVERSEN,

Attorneys for Plaintiff.

/s/ J. CHAS. DENNIS,

/s/ THOMAS R. WINTER,

Attorneys for Defendant.

[Endorsed]: Filed May 18, 1950.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above matter having regularly come on for trial before the undersigned judge sitting without a jury, the parties having entered into a stipulation as to the facts and issues herein but reserving the right to introduce further additional evidence, and testimony having been taken supplemental to such stipulation, and the matter having been fully argued; upon the basis of the stipulation and testimony, the court hereby makes the following:

## Findings of Fact

## I.

This action arises under Section 1340, Title 8, of the United States Code.

## II.

Plaintiff is, and at all times hereinafter mentioned, was a corporation organized under the laws of the State of Washington having its principal place of business at Pullman, Washington, and has paid its last annual license fee due the State of Washington.

## III.

Defendant is, and at all times material hereto was, the United States collector of internal revenue for the district of Washington and all taxes hereinafter mentioned were paid to defendant by plaintiff pursuant to demand therefor made by defendant and the same were paid by the said defendant into the treasury of the United States.

## IV.

At all times since plaintiff's organization and until March 1, 1947, all of its stock was owned by Associated Students of the State College of Washington, a non-profit corporation organized under the laws of the State of Washington and at all times subsequent to March 1, 1947, all of plaintiff's stock was held by the Board of Regents of the State College of Washington pursuant to a trust agreement between said Board of Regents and the Associated Students of the State College of



Washington whereby the principal and net earnings of the trust shall be used only in furtherance of the purposes for which the Associated Students of the State College of Washington is organized. At all of said times qualifying shares were held by officers of plaintiff corporation in trust for the owner thereof.

V.

Plaintiff, Students Book Corporation, succeeded in 1923 to the Student Book Incorporated, a corporation organized in 1914 by the Associated Students of the State College of Washington hereinafter referred to as the ASSCW, which supplied the original capital in the sum of \$2,000. The State College of Washington is an educational institution operated by the government of the State of Washington and is for the most part supported by public funds. The ASSCW has been recognized by the Commissioner of Internal Revenue as exempt from federal income taxes under Section 103(6) of the Revenue Act of 1928 and Section 231 (6) of the Revenue Act of 1926 according to a letter from the Commissioner of Internal Revenue to the corporation dated July 14, 1930. Neither the Students Book Corporation nor the Associated Students of the State College of Washington has at any time been engaged in the carrying on of propaganda or otherwise attempting to influence legislation.



## VI.

Plaintiff corporation for many years has operated a store on its own property adjoining the campus of the State College of Washington for the sale to students and faculty members at reasonable prices of textbooks, students' supplies and other items for the accommodation of students and faculty members. The management of the Students Book Corporation at all times works in coordination with the administration and faculty of the State College in determining items of textbooks and students' supplies to be carried in stock. In addition to its main store, plaintiff also has conducted a student restaurant on the campus of the State College in quarters furnished to plaintiff without charge by the college in a building designated the old gymnasium. Approximately four per cent of plaintiff's business is done with persons not connected with the college.

## VII.

During all the taxable years involved herein by the terms of plaintiff's by-laws, all actions of its board of trustees were subject to the approval of the president of the college, and at all of said times all actions of the governing body of the ASSCW were likewise subject to the approval of the president of Washington State College.

## VIII.

Dividends paid by plaintiff corporation were, from the time of its organization until March 30,

1929, paid to ASSCW in the form of stock dividends, thereafter dividends were paid in cash to the ASSCW. Dividends paid in 1933 and 1934 were earmarked in the resolution by which they were declared for specific purposes; first, to finance a publication of the ASSCW for distribution to students, and second, to finance the painting of President Emeritus E. A. Bryan, which was presented to the State College of Washington. With these exceptions the Board of Trustees of Students' Book Corporation followed the dividend policy to make available funds for the building of a student union building adjacent to or on the present campus of the State College of Washington. The Board of Trustees declared dividends at such times as the ASSCW asked for money to implement the program for the construction of a student union building, which dividends were transferred to the bursar (now comptroller) of the State College, who in turn has disbursed these funds for the purchase of lands, title to which is held in the name of the State of Washington, and for other purposes connected with the construction of the student union building. Funds in excess of those needs are held in marketable securities.

## IX.

Plaintiff corporation has never passed a rebate to the students, faculty members or customers. The proposed student union building, when constructed, will be the property of the State of Washington.

## X.

Plaintiff has heretofore paid the defendant as Collector of Internal Revenue pursuant to demands made by the defendant, the following taxes:

Year	Nature of Tax	Date Paid	Amt. Paid
1943	Corporate Income Tax	Mar. 15, 1944	
		June 15, 1944	\$ 4,760.48
		Sept. 15, 1944	
		Dec. 15, 1944	
1943	Corporate Declared Value Excess Profits Tax	Mar. 15, 1944	
		June 15, 1944	349.84
		Sept. 15, 1944	
		Dec. 15, 1944	
1943	Excess Profits Tax	Mar. 15, 1944	
		June 15, 1944	13,735.26
		Sept. 15, 1944	
		Dec. 15, 1944	
1943	Capital Stock Tax	July 31, 1943	375.00
1944	Corporate Income Tax	Mar. 15, 1945	
		June 15, 1945	4,840.07
		Sept. 15, 1945	
		Dec. 15, 1945	
1944	Capital Stock Tax	July 31, 1944	250.00
1945	Corporate Income Tax	Mar. 15, 1946	
		June 15, 1946	5,626.31
		Sept. 15, 1946	
		Dec. 15, 1946	
1945	Capital Stock Tax	July 31, 1945	250.00
1946	Corporate Income Tax	Mar. 15, 1947	
		June 15, 1947	14,159.53
		Sept. 15, 1947	
		Dec. 15, 1947	
1947	Corporate Income Tax	Mar. 15, 1948	
		June 15, 1948	27,586.66
		Sept. 15, 1948	
		Dec. 15, 1948	
Total Payments.....			\$71,933.15

## XI.

Plaintiff filed with defendant claims for refund for all taxes listed above for the years 1943, 1944 and 1945, on March 13, 1947. Plaintiff was notified of the rejection of each of said claims for refund by letter dated September 27, 1948, signed by E. J. McLarney, Deputy Commissioner of Internal Revenue. Claims for refund of the amount shown above for the years 1946 and 1947 were filed with the defendant by plaintiff in June, 1948, but after the expiration of more than six months thereafter plaintiff had not been advised of any action upon said claims.

## XII.

The activities of the plaintiff have at all times been integrated and coordinated with those of the ASSCW and the State College and plaintiff is the alter ego of the ASSCW and at all times material hereto was organized and existed for the purpose of carrying out the objectives of the ASSCW which were incident and auxiliary to the educational purpose of the State College of Washington.

From the foregoing Findings of Fact the court makes the following:

## Conclusions of Law

## I.

Plaintiff was during the years 1943 to 1947, inclusive, a corporation organized and operated exclusively for an educational purpose and no part of its net earnings inured to the benefit of any private individual or shareholder and no substantial

part of its activities was in carrying on propaganda or otherwise attempting to influence legislation.

## II.

During the years 1943 to 1947, inclusive, plaintiff was entitled to be exempt from corporate income tax, capital stock tax, excess profits tax and corporate declared value excess profits tax.

## III.

Plaintiff is entitled to recover from the defendant taxes paid for the years 1943 to 1947, inclusive, in the sum of \$71,933.15, with interest thereon at the rate of 6% per annum as provided in United States Code, Title 26, Section 3771, and plaintiff's costs and disbursements incurred herein.

Done in open court this 12th day of July, 1950.

/s/ CHARLES W. LEAVY,  
U. S. District Judge.

Presented by:

/s/ FRED L. HALOCKE,  
Assistant Attorney General of  
the State of Washington.

[Endorsed]: Filed July 12, 1950.



In the District Court of the United States for the  
Western District of Washington, Southern Division

No. 1226

STUDENTS BOOK CORPORATION,

Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,

Defendant.

### JUDGMENT

The above matter having regularly come on for trial before the undersigned judge sitting without a jury, and the court having read the stipulation of the parties and heard the testimony and the arguments of counsel and having made Findings of Fact and Conclusions of Law herein, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff shall recover from defendant as Collector of Internal Revenue for the district of Washington \$71,933.15 with interest thereon at six per cent per annum computed upon the following basis: Interest upon \$375.00 from July 31, 1943; interest upon \$18,845.58 from December 15, 1944; interest upon \$250.00 from July 31, 1944; interest upon \$4,840.07 from December 15, 1945; interest upon \$250.00 from July 31, 1945; interest upon \$5,626.31 from December 15, 1946; interest upon \$14,159.53



from December 15, 1947; interest upon \$27,586.66 from December 15, 1948. Plaintiff shall recover its costs and disbursements herein taxed by the clerk in the sum of \$75.16.

Done in open court this 12th day of July, 1950.

/s/ CHARLES M. LEAVY,  
U. S. District Judge.

Presented by:

/s/ FRED L. HALOCKE,  
Assistant Attorney General of  
the State of Washington.

[Endorsed]: Filed July 12, 1950.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Clark Squire, Collector of Internal Revenue for the District of Washington, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on July 12, 1950.

Dated this 31st day of August, 1950.

/s/ J. CHARLES DENNIS,  
United States Attorney for the Western District  
of Washington.

/s/ GUY A. B. DOVELL,  
Assistant United States Attorney for the Western  
District of Washington.

Copy of the within Notice of Appeal mailed to Smith Troy, Attorney General, State of Washington, this 31st day of August, 1950.

/s/ E. E. REDMAYNE,  
Deputy Clerk.

[Endorsed]: Filed August 31, 1950.

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO  
DOCKET APPEAL

This matter coming on to be heard ex parte this date on motion of the defendant, through his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, for an order extending the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit, to enable the defendant to procure a transcript of testimony, and other evidence offered at the trial of this case, and it appearing the defendant's notice of appeal was filed herein on August 31, 1950, and that such time may be extended to a day not more than 90 days from the date of filing said notice of appeal, and good cause appearing therefor, it is hereby

Ordered that the time for filing the record on appeal and docketing the appeal with the Appel-

late Court is hereby extended to and including the 29th day of November, 1950.

Done in Open Court this 1st day of Sept., 1950.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ GUY A. B. DOVELL,  
Assistant United States  
Attorney.

[Endorsed]: Filed September 1, 1950.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

To the Clerk of the above-entitled Court:

The above-named defendant, Clark Squire, United States Collector of Internal Revenue for the District of Washington, by and through his attorneys of record, J. Charles Dennis, United States Attorney for the Western District of Washington, and Guy A. B. Dovell, Assistant United States Attorney for said district, and Thomas R. Winter, Special Assistant of the Chief Counsel, Bureau of Internal Revenue, pursuant to Rule 75(a) of Rules of Civil Procedure, as amended, hereby designates the entire and complete record in this case, including a transcript of all proceedings and evidence and

all of the original exhibits, to be contained in the record on appeal.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ GUY A. B. DOVELL,  
Assistant United States  
Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the Chief Counsel, Bureau of  
Internal Revenue.

Affidavit of mailing attached.

[Endorsed]: Filed November 22, 1950.

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In the District Court of the United States for the  
Western District of Washington, Southern Di-  
vision

No. 1226.

STUDENTS BOOK CORPORATION,  
Plaintiff,  
vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,  
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable Charles H. Leavy,  
United States District Judge.

May 18, 1950, 10:00 A.M.

Appearances:

THOMAS R. WINTER, ESQ.,

Assistant United States Attorney,

Appeared on Behalf of Defendant; and

LYLE L. IVERSEN, ESQ.,

Assistant Attorney General, State of  
Washington.

Appeared on Behalf of Plaintiff.

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The Court: Docket 1226, Students Book Corporation vs. Clark Squire, Collector of Internal Revenue, for trial. Are the parties ready?

Mr. Iversen: The Plaintiff is ready, your Honor.

Mr. Winters: The Defendant is ready, your Honor.

The Court: There has been submitted here what is designated as a stipulation as to facts.

Mr. Winters: Yes, your Honor.

The Court: I haven't had an opportunity, of course, to examine it because it was filed just this morning.

Mr. Winters: It is a little more than a stipulation of facts, your Honor. Paragraphs one through thirteen, your Honor—well, through thirteen down to line ten—are facts which we have stipulated are established facts in this case and may be taken as deemed to have been admitted by the Court. Then we further stipulate and agree as to the issues presented by this case on lines ten through fifteen—



about fifteen and a half on my copy—and we have set forth the Statute involved and Plaintiff has submitted its contentions on page nine and Defendant has submitted his contentions on page ten. On the last page [3\*] there we further agree that either party reserves the right to introduce additional testimony.

Attached to the stipulation are copies of original documents which we have stipulated are true copies. We haven't checked them but if there is an error here and there we can bring it to the attention of the Court and have it corrected.

And, there is one exhibit attached thereto that hasn't been designated in the pre-trial stipulation and that is Exhibit 3, and we would want to explain to the Court that that is the letter from the Commissioner to the Book Store Corporation, dated November 12, 1947.

Mr. Iversen: There are several respects in which an explanation of some of these exhibits needs to be made. After the copies were made up and stipulations prepared, I discovered that there were some of these documents that—there were some matters that—I had not been aware of at the time they were made up, and so I will introduce that information by testimony, such as the fact that some of these documents were not in effect during the taxable years, and so on, but other than that, I think the stipulation carries out most of the matters before the Court.

Mr. Winter: I think all other matters have been admitted by the pleadings. Our intention wasn't to

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.



make a [4] complete pre-trial order so that it would take the place of the pleadings but any controversial facts we have been able to agree upon we have set forth in the stipulation and agreed upon the issues and contentions of the parties which are set forth.

Mr. Iversen: And the record is preserved here to introduce additional testimony and evidence.

The Court: You have stipulated and are in accord on the proposition that Section 101, sub-section 6, is the only part involved?

Mr. Iversen: Yes. This case involves refund of income taxes and also refund of excess profits tax but the excess profits tax statute provides that corporations shall be exempt from that if it is exempt for income tax purposes, so that, under the statute, the determination for income tax purposes determines the capital stock and excess profits tax also.

The Court: Isn't it your contention that subdivision 14 of section 101 has any application?

Mr. Iversen: No. Section 6 is the only one we will make any contention on.

The Court: Well, why wouldn't 14 have application?

Mr. Iversen: We were not trying to establish it on that. We don't think it is that kind of a corporation. [5] It is not simply a holding company, so we haven't made any contention on 14.

The Court: Very well. Unless it should develop later, from examination, that 14——

Mr. Winter: No claim has been made. In order to obtain exemptions from income tax, a claim must be made, and no claim has been made for refund in

this suit, so that, therefore, 14 couldn't have application in this suit because the Court would have no jurisdiction to consider an application in this present suit, no claim having been made under that section and Plaintiff is asserting none.

Mr. Iversen: If the Court please, I think the contentions are very well set up in the stipulation. I don't know whether you have had a chance to read that over yet.

The Court: No; it just now came to me.

Mr. Iversen: Very generally, your Honor, here is what is involved.

The State College of Washington is, of course, a public institution of the State of Washington. At the College there is organized the Associated Students—the A.S.S.C.W

It is an exempt corporation under the income tax statutes and recognized as such by the Commissioner of Internal Revenue. [6]

The Associated Students, some years ago—about 1913 or '14—organized the Students' Book Company, a predecessor corporation of the present Plaintiff, Students Book Corporation, and they furnished the original capital for it—about two thousand dollars—and subsequently, in 1923, the new corporation was formed, the Students Book Corporation, and gave to the Associated Students, who held all the stock in the Students' Book Company, twenty-five thousand dollars worth of its stock in exchange for all of its assets in the old Students' Book Company, and it has been the owner of all the capital stock since.

The articles of incorporation of the Students Book Corporation are in the normal form of corporations under the laws of Washington.

The Associated Students are formed as a non-profit corporation under the laws of Washington.

The Associated Students has, at all times, appointed a Board of Trustees to the Students Book Corporation. That Board has consisted of some faculty and some student members and since 1933, and at all times involved in this litigation, there has been a clause in the by-laws of the Corporation that all the Minutes of the Board of Trustees of the Students Book Corporation must be submitted for approval to the President of the State College.

The Book Stores carries on the ordinary functions [7] of a students' book store. Business is principally done with students and members of the faculty of the State College. About four per cent of the business is done with outside people. The stock consists of books, students' supplies, engineer and laboratory equipment, and things of that kind and some refreshments and restaurant activities.

The stock was increased by issuance of stock dividends and an amendment to the Articles of Incorporation until at the present time the outstanding stock is seventy-seven thousand dollars.

In 1947, on March 1, 1947, the Associated Students transferred the stock to the Regents of the State College under a trust agreement by which the Regents agreed to hold the stock and to use any profits from the corporation solely for the purposes for which the A.S.S.C.W. was formed.

Now, the A.S.S.C.W. carries on the athletic activities and the dramatics——

The Court: And that is a corporation also?

Mr. Iversen: Yes, a non-profit corporation under the laws of the State of Washington and recognized as an exempt institution.

The Book Store has never paid any dividend to individuals but the dividends have been paid to the Associated Students. The first two dividends in money were [8] paid for ear-marked purposes. The resolution by which they were declared specified the use to which the money was to be put. One was for a painting of a president emeritis and another was to print a publication, "Getting Somewhere," to be issued to the students. And, subsequently the policy was established of setting aside money for building a student union building on the campus.

Dividends have been declared, as requested by the Associated Students, for this purpose. Real estate has been purchased in the value of forty-five thousand dollars, title to which has been placed in the State of Washington. The real estate has been accepted by the Regents of the State College and by resolution they recognized that this was purchased by the A.S.S.U.W.—that is the parent corporation—and held for purposes of the student union building. In addition there has been expended something like thirty-two thousand dollars for purposes of drafting plans and various preliminaries in connection with the students union building. The building has not yet been completed.

Some of this property purchased for the student



union building is not yet used for that purpose and, I think, it is rented by somebody and the profits are used for repairs to the building and some expenditures have been made in conjunction with the purchase of securities, and some [9] moneys taken in have been invested in marketable securities.

The bursar of the College—or the comptroller as he is now called—is the treasurer. The by-laws provide that all actions of its Board of Control—which which is the governing body—are subject to the approval of the President of the College.

The book store carries on a rather sizeable business.

The Court: Well, the Associated Students are the owners of the stock in the book store?

Mr. Iversen: That is right, except, that since March 1, 1947, stock has been transferred to the Board of Regents under a trust agreement by which they agree to hold the stock and to apply any proceeds for the purposes of the Associated Students. But, the Associated Students has at all times been the owner of the stock until they transferred it to the Board of Regents.

The book store board is appointed by the Associated Students and all their actions must be submitted to the President of the College for his approval.

Now, I think that, in general, is the factual set up in the case, and I would like to call a witness to supplement some of these matters.

The Court: Very well. [10]

Mr. Iversen: Do you want to make a statement now, or should I proceed?

Mr. Winter: No.

Mr. Iversen: We will call Mr. Pettibone. [11]

CARL PETTIBONE

called as a witness for and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: State your full name.

The Witness: Carl Pettibone.

The Clerk: Spell your last name.

The Witness: P-e-t-t-i-b-o-n-e.

Mr. Winter: I think you should first offer in evidence the stipulation and the exhibits attached thereto.

Mr. Iversen: Yes.

Mr. Winter: Have they been received, your Honor?

The Court: Yes. I haven't had an opportunity to read it.

Mr. Winter: It is also stipulated that Exhibit 3, while it isn't mentioned, attached to the stipulation, is a copy of a letter to the Commissioner and speaks for itself, and you make that as a joint offer?

Mr. Iversen: Yes.

The Court: There is no issue made at all concerning these various exhibits?

Mr. Iversen: No.

The Court: Of course, if there were a stipula-



(Testimony of Carl Pettibone.)

tion, there couldn't be, but this is sort of a hybrid—both a stipulation of facts and a pre-trial conference order. [12] Very well; you may proceed.

By Mr. Iversen:

Q. Mr. Pettibone, what is your position?

A. Business manager and comptroller for the State College of Washington.

Q. How long have you held that position?

A. Since—officially since—April 1, 1947.

Q. You reside at Pullman? A. Right.

Q. And prior to that time did you have an official connection with the College or any of its activities?

A. I was employed as manager of the Student Book Corporation from the first of 1932 through '46.

Q. Are you familiar with the affairs of the Student Book Corporation subsequent to 1946?

A. I have attended regularly the Board of Trustees meetings of the Student Book Corporation.

Q. Mr. Pettibone, the stipulation contains the Constitution of the Associated Students. Can you state at this time when that Constitution was adopted?

A. The Associated Students adopted a new constitution in—well, may I have, may I have the file that is in the chair—that one file there.

Q. This file? A. Right. [13]

(File handed to witness by bailiff).

A. (Continuing): In March of 1947.

(Testimony of Carl Pettibone.)

Q. That was the date that that constitution was adopted?

Mr. Winter: Is that Exhibit 5, Counsel?

Mr. Iversen: I will have to take a look here. Exhibit 5; that is right.

Mr. Winter: When did you say it was adopted?

Q. (By Mr. Iversen): You said that was adopted when?

The Court: March, 1947.

Q. (By Mr. Iversen): Now, do you have the Constitution that was in effect prior to that?

The Court: Let me interrupt now. Is this constitution that you referred to as adopted in March, 1947, subsequent to the time when the taxes were levied?

Mr. Iversen: Part of this covers the year 1947. The action involves the taxable years 1943 through 1947.

The Court: Including 1947?

Mr. Iversen: That is right.

Mr. Winter: Are they filed on the calendar year basis; I don't recall?

Mr. Iversen: Yes; 1947 was made a special claim and under our pleadings we have a review upon others and—— [14]

A. I find that the official notice of adoption of the new constitution by the A.S.S.C.W. was April 2, 1947.

Q. (By Mr. Iversen): Now, do you have the constitution that was in effect prior to April 2, 1947, and during the years——

(Testimony of Carl Pettibone.)

A. I have a portion of the "Evergreen," the student publication, dated January 13, 1947, that provides the constitution changes under consideration for revision by the student body committee. "The changes, it is presumed, will be printed in a later issue"—which was the case.

Q. Now, do you know whether or not the one that is set out there is the one that was in effect prior to the adoption of the constitution that is in evidence, Exhibit 5?

Mr. Winter: Don't you have that other constitution?

Mr. Iversen: I think he's got his book there.

Mr. Winter: If that is a copy, of course——

Mr. Iversen: I thought I would offer the copy rather than the book. If you want the book——

A. The statement is made: "The Evergreen is printing a copy of the constitution changes under consideration for revision by the student body committee. The changes will be brought before the College students in the [15] future for recommended changes. It is recommended that all students read it carefully to make worthwhile changes to meet the changing needs."

Q. (By Mr. Iversen): The question is, do you know that that is a copy of the constitution that was in effect prior to the adoption of the one adopted in the stipulation? Do you know that that is a copy of the constitution that was in effect at that time?

Mr. Winter: Well, Mr. Iversen, I think the constitution that is set forth in the stipulation as Exhibit 5 is the one adopted April 2nd, and this is the

(Testimony of Carl Pettibone.)

one previous to that. Do you have a copy in the book?

The Witness: I believe that the book contains the constitution since 1947, or parts of the constitution prior thereto.

Q. (By Mr. Iversen): Don't you have a book there showing the constitution in effect prior to April 1, 1947?

A. The A.S.S.C.W. constitution to April, 1947; yes.

Q. Now, will you open your book to that?

A. Constitution and by-laws, as amended, up to September 1, 1945, revised March, 1934, adopted April 17, 1934; so, I do have a copy of that.

Mr. Winter: Mr. Iversen, may I suggest that we [16] have no objection to offering that book and substituting a copy.

Mr. Iversen: All right.

Mr. Winter (Continuing): Of the constitution and it may be marked any number that the Court desires to give it.

Mr. Iversen: Then I will offer the book and substitute a copy.

Mr. Winter: No objection; and you will furnish me with two copies? You can take the book and prepare a copy and send the bottom copies to me. I am sure that the State of Washington will not miscopy except for human errors.

Q. (By Mr. Iversen): Mr. Pettibone, the book store by-laws, as included in the stipulation, I believe you have said, were amended in October, 1947.

(Testimony of Carl Pettibone.)

Can you just state what the fact is about the amendment to the by-laws, and I refer particularly to article 3, sections 1 and 2.

A. Well, really, at the time the Board of Regents acted in the matter of the trust agreement proposed by the Associated Students, the Regents required, or proposed, that the business manager of the College act as a trustee on the book store board. In order to accommodate one additional faculty member, it was deemed desirable to add one [17] additional student, because the A.S.S.C.W. has always maintained one more student on its book store board than there are faculty persons, so that it was recognized then, on October 15, 1947, the need for two additional persons to act on the board of trustees, increasing thereby the number from seven trustees to nine.

Q. Now, was there an amendment adopted to the by-laws at that time?

A. The amendment adopted on October 15th—section one—"The stockholders of this corporation shall be nine in number."

Q. Do you have a copy of that? Mr. Pettibone, do you have a copy of that amendment?

A. I do not.

Mr. Winter: We have no objection to your offering it and substituting a copy.

Q. (By Mr. Iversen): Didn't I give you a copy of that a while ago? They were on some small slips.

A. I don't have a copy here; but these minutes consist of section 1, section 2, and section 1 on



(Testimony of Carl Pettibone.)

another portion of the by-laws—all relating to the number of stockholders and method of appointing them.

Q. Well, they are just short; will you just read them? [18]

The Court: You mean stockholders or trustees or directors?

The Witness: The procedure has been to—on the part of the Associated Students to—appoint seven stockholders—and then, as revised, nine stockholders. The stockholders have a stockholders meeting and elect a Board of Trustees.

The Court: How do the stockholders acquire their stock?

The Witness: Each stockholder holds one share, in trust, for the Associated Students. The remaining shares of stock are directly in the name, at the present time, of the Board of Regents. Prior to April—prior to 1947—the remaining number of shares was directly in the name of the Associated Students. So that, at the present time, 761 shares are in the name of the Board of Regents and one share each in the seven stockholders who hold it in trust, at the present time, for the Board of Regents.

The Court: Well, the stock is actually owned by the Associated Students?

The Witness: It was—the stock is—actually owned by the Associated Students.

The Court: And transferred in trust to the Board of Regents?

The Witness: That is right. [19]



(Testimony of Carl Pettibone.)

The Court: And the student and faculty stockholders each have one share, transferred from time to time as that personnel changes?

The Witness: That is correct.

Mr. Iversen: I would like to offer a copy in evidence instead of the book.

The Court: You may step up there, Mr. Iversen.

(Mr. Iversen approaches witness.)

Q. (By Mr. Iversen): Now, I will ask again, do you have copies of the amendments of October, 1947? A. I have two of them.

Q. Well, the amendments to articles 1 and 2, section 3?

A. Well, this book is—sections 1 and 2 of article 3; correct.

Mr. Iversen: Will you mark these for identification?

The Clerk: As one exhibit?

Mr. Iversen: Yes.

The Clerk: Plaintiff's Exhibit 9 marked for identification.

Q. (By Mr. Iversen): I hand you Plaintiff's Exhibit 9 for identification—— [20]

The Court: Hand it through the bailiff.

Q. (By Mr. Iversen, continuing): And ask you if that is a true copy of the amendment adopted in November—or October—1947? A. It is.

Mr. Iversen: I offer in evidence the copy.

The Court: I understand there is no objection, Mr. Winter?

(Testimony of Carl Pettibone.)

Mr. Winter: I just want to be sure. I would like to ask a question.

The Court: Very well.

Mr. Winter: Those are—what did you say they are? What are the papers?

The Witness: Pardon?

Mr. Winter: The exhibit you are referring to.

The Witness: These are amendments to the by-laws of the Student Book Corporation.

Mr. Winter: They are amendments to the by-laws of the Student Book Corporation? When were they enacted?

The Witness: October 15, 1947.

Mr. Winter: By whose action?

The Witness: By action of the—by action of the stockholders of the Students Book Corporation.

Mr. Winter: Was it at a stockholders meeting that day? [21]

The Witness: It was at a stockholders meeting.

Mr. Winter: And the by-laws were enacted on that date? There is no doubt about it?

The Witness: Pardon?

Mr. Winter: We have no objection, your Honor.

The Court: They may be admitted.

(Plaintiff's Exhibit Number 9 for identification admitted in evidence.)

Mr. Winter: May we have copies?

Mr. Iversen: Yes; I will prepare copies.

Q. (By Mr. Iversen): Mr. Pettibone, in addition to the activities carried on at the book store

(Testimony of Carl Pettibone.)

itself, merchandising during the faculty years involved, 1943 through 1947, did they also carry on an activity at another place other than at the book store itself?

A. Well, the book store has continuously, during the time it was—during the time it has been the Student Book Corporation has—maintained a text book, general student supply and restaurant business. The pressure of returning war veterans made it imperative that some shift be made to accommodate the volume of customers and at the original suggestion of one of the staff and the admission officer of the College, the Book Store was offered the opportunity to consider going into—moving the restaurant [22] to the old gymnasium on the College campus. Subsequently such a move was approved and the book store has, since midnight—well since late 1946—operated a restaurant in the old gymnasium on the campus. The arrangement under which it operates is that the Board of Regents has—the State College provides the rent free building insofar as the Students Book Corporation is concerned.

Mr. Winter: Is this a matter of an exchange between the Association and a matter of needing authorization?

Mr. Iversen: No.

The Court: You may go ahead.

A. (Continuing): Well, it has operated a restaurant in the gym since about August, 1946.

(Testimony of Carl Pettibone.)

Q. (By Mr. Iversen): Under what circumstances did they obtain use of the building?

A. There has never been a formal agreement. That is, a formal document to indicate any permanent working relationship but the Book Store has provided—has been provided—free the gymnasium until such time as it is expected that the new Student Union building is completed.

Q. During the taxable years, or 1943 through 1947, has the comptroller or the bursar of the College exercised any function in connection with the book store? [23]

A. If I may use the word comptroller as meaning bursar; or comptroller as business manager, or comptroller.

Q. Explain that.

A. Well, we had a new college president effective January 1, 1946. At that time—prior to that time—the principal business official was known as the bursar. Subsequently the title was changed to comptroller and once again, subsequently and after that, the title was changed to business manager and comptroller. However, it is one office in any event. But, the comptroller then has, since 1933, held the bond—the fidelity or surety bond—of the employees who are bonded in the Students Book Corporation by reason of a practical requirement on the part of the president of the Institution that there be an insured protection insofar as book store funds were concerned in the Students Book Corporation. Since early in 1947 the comptroller has sat as a member of

(Testimony of Carl Pettibone.)

the Board of Trustees of the Student Book Corporation.

Q. You spoke of the requirement of the president of the College. Well, state what you mean by the requirement of the president.

A. Well, in 1933 there was action taken by the Associated Students with regard to the Students Book Corporation which resulted in the then president of the State College, E. O. Holland, making a statement to the effect— [24] well, I have a letter here which states his interest in—

Q. Well, will you produce the letter?

A. Well, I have a May 30th letter, 1933, addressed to Ivar Putnam, president of the Board of Trustees of the Student Book Corporation. May I read it?

Q. Go ahead.

Mr. Winter: We will object to it as being self-serving.

The Court: Yes.

Mr. Winter: And not the best evidence.

Mr. Iversen: Let me see the letter.

Mr. Winter: The witness is not here, apparently, who wrote the letter.

Mr. Iversen: Let me lay—

Mr. Winter: And it is not binding on the United States and he wouldn't have authority to make such demands. It is a question of what the articles or by-laws provide.

Mr. Iversen: Will you mark this?

The Clerk: Plaintiff's Exhibit 10 marked.



(Testimony of Carl Pettibone.)

Mr. Iversen: Let me lay a foundation for the introduction of the letter.

The Court: Show it to Mr. Winter.

(Document shown to Mr. Winter.)

Q. (By Mr. Iversen): Mr. Pettibone, I have Plaintiff's Exhibit 10 and [25] ask you how that came into your possession?

A. Well, it is a letter which was addressed by the then president of the State College to one of the members of the book store board who transferred it to me as manager of the store at that time.

Q. And in whose files has it been kept?

A. It has been kept in the book store files, or in my file, since its original—since approximately the time of its original—receipt by the book store.

Q. Did you have any connection with the book store at the time; May 30, 1933?

A. I was manager of the store.

Q. Do you personally know of the fact that this has been in those files since that time?

A. Yes.

Mr. Iversen: I am going to offer in evidence Plaintiff's Exhibit 10; your Honor. This is the letter from the president of the college requesting—

Mr. Winter: The College is not a part of this action.

The Court: Well, you just make an objection and they can offer it.

Mr. Iversen: All right; I have already made it.



(Testimony of Carl Pettibone.)

Mr. Winter: Well; we object to it on the grounds that it is not binding on the United States. We [26] have no objection to the Court's receiving it for what it is worth.

The Court: Well, the objection will be overruled and an exception allowed. I might state my reason for allowing this to go in evidence, although it is probably somewhat remote, is that it may be relevant in establishing the close relationship between what is recognized as without question or doubt a State institution free from all tax by the Federal Government.

Mr. Winter: I might say that I toned down my objection considerably after I read the letter. I was a little premature but I don't think it hurts or helps us.

The Court: It will be admitted.

(Plaintiff's Exhibit Number 10 for identification received in evidence.)

Mr. Iversen: The letter reads:

The Court: I don't think you need to read it; it will be marked admitted.

Q. (By Mr. Iversen): Mr. Pettibone——

Mr. Winter: We would like to withdraw it for the purpose of making a copy.

The Court: Oh, you will have a chance to make a copy. [27]

Q. (By Mr. Iversen): Mr. Pettibone, what action was taken as a result of the letter?

A. Well, the action taken consisted of two or

(Testimony of Carl Pettibone.)

three prompt meetings of the book store board to consider the problem of handling the request that the president of the College made and it was handled as evidenced by a later communication to the satisfaction of the president and of the Board of Regents.

Q. Do you have a later communication?

A. Yes.

Q. Who was that from and to whom was it addressed? I might say, at first how was it handled? What was done?

A. The thing that was done, the book store board agreed to provide the president, promptly, with minutes of each of its meetings for his approval. The point—one point—worked out with him was that in the case of a delay which might harm the book store business, a time limit was established beyond which approval was considered as having been given.

Q. Now, what is this other communication that you refer to?

A. A communication dated June 5, 1933, which acknowledges receipt of minutes of the book store meeting which considered the problem brought up originally by President [28] Holland and which, as I said, indicates his agreement that the change, as proposed, satisfactorily meets the requirement that he referred to in his original letter. The one——

Q. Go ahead.

A. The one point not covered in any communication—either of these two communications—and that goes back to where the start was—is that the bonds

(Testimony of Carl Pettibone.)

of the employees were then placed in the hands of the bursar or comptroller of the State College.

Mr. Iversen: Will you mark this?

The Clerk: Plaintiff's Exhibit 11 marked for identification.

The Court: These fidelity bonds, Mr. Pettibone, that you referred to, of the various employees ran in favor of whom?

The Witness: Of the Students Book Store Corporation.

Mr. Iversen: I offer in evidence Plaintiff's Identification on Number 11.

Mr. Winter: We object to it. It is incompetent, irrelevant and immaterial and the issues are not involved in this case.

The Court: Does it make reference to the Exhibit just admitted?

Mr. Winter: Yes; your Honor. [29]

Mr. Iversen: This is the answer to the Exhibit.

The Court: The objection will be overruled, and it may be admitted.

(Plaintiff's Exhibit Number 11 for identification admitted in evidence.)

Q. (By Mr. Iversen): Mr. Pettibone, the arrangement worked out of submitting the minutes to the president, has that action been employed subsequent to its adoption in 1933?

A. It has been strictly complied with—or was strictly complied with—for the period that I was manager of the store. Since I have been in the

(Testimony of Carl Pettibone.)

administrative office I have seen several of the minutes which have been forwarded to the administrative office by the present manager. I can not say that I can state that every one of the minutes were forwarded to that office by the present manager of the store; but, the present manager of the store is here and would have to testify on that.

Q. The stipulation that is in here does not include by-laws of the A.S.S.C.W. Do they have by-laws and do you have a copy of the by-laws? Do you have the by-laws?

A. I do have a copy of the by-laws as adopted April 2, 1947.

Q. Do you have a copy that is available for introduction without putting in the book? [30]

A. Well, it is elsewhere than here if I do.

Mr. Iversen: If I could speak to the witness off the record.

Q. (By Mr. Iversen): I think the by-laws are in that same set of papers as the constitution that you referred to.

A. This would be the by-laws prior to the change on April 2, 1947.

Q. All right. Now, do you have a copy of the by-laws subsequent to the change in 1947?

A. I do have the original; no, Mr. Attorney, I do not find a copy of the original.

Q. Do you have a copy that you know is correct?

A. No. I say I do have the original.

Mr. Winter: I suggest you offer the original and substitute a copy.

(Testimony of Carl Pettibone.)

Mr. Iversen: All right; I will offer the book.

Mr. Winter: No objection.

The Court: Very well; it will be admitted.

Mr. Iversen: And later to substitute a copy.

The Court: And a copy may be substituted.

The Clerk: Plaintiff's Exhibit 12 marked and admitted.

(Plaintiff's Exhibit Number 12 marked for identification and admitted in evidence.) [31]

The Court: Do you have a copy?

Mr. Iversen: I would like to use this and offer a copy later. It is a student publication but it does have the by-laws and constitution. Then until we can copy it, your Honor can look at that.

I believe that is all; you may examine.

### Cross-Examination

By Mr. Winter:

Q. Mr. Pettibone, I understand you became the manager of the Student Book Corporation in 1933?

A. In 1932.

Q. 1932? A. Right.

Q. What was your business before that time?

A. I was a college student from 1923 to 1927, employed in the book store.

Q. What was the nature of your employment?

A. Clerk, fountain boy, cook.

Q. And you became manager after you graduated; and did you work there after your graduation?



(Testimony of Carl Pettibone.)

A. From 1927 through 1931 I was employed by the book store.

Q. How many employees did they have about that time; do you recall?

A. I couldn't provide figures. I mean, honest recollection. [32]

Q. And you were manager until?

A. April 1, 1947. No, through—I was actually—I carried the title through that period. The last three months I was actually on detached duty with the State College.

Q. In 1947 they had 301 employees; is that right?

A. Well, I can't state that from direct and immediate knowledge.

Q. How many employees—strike that. When did you open—or when did the corporation open, the restaurant in the gymnasium?

A. In August, 1946.

Q. Did they use part time employees in that operation?

A. Many, many part time employees.

Q. They employed students?

A. A very many students are employed.

Q. Do they employ anyone from the downtown area?

A. Well, I can't—I believe that is something that the present manager of the store could answer.

Q. During the time you were manager?

A. During the time I was manager, I would say, with the exception of the cooks and the manager of the restaurant, perhaps three or four full



(Testimony of Carl Pettibone.)

time waitresses and the rest [33] were students on part time employ.

Q. Who handled the hiring and firing of the employees; the manager?

A. The manager of the book store has at all times been responsible for the hiring and firing. In actual practice it has always worked out where a department manager, such as the restaurant manager, would hire subject to the approval of the manager of the book store.

Q. How many departments do you have in the book store corporation?

A. It is actually considered as being the test book department, the supply department, and the restaurant department in terms of three specific accounting breakdowns.

Q. Did you carry a substantial stock of candies and confectionaries?

A. Candies and confectionaries are always carried by the book store.

Q. Do you carry all kinds of stationery supplies and guests—guest—supplies?

A. The store has a guest assortment.

Q. About what inventory—about what would be the value of your inventory—in 1947? Do you have any idea? You had on exhibit—or the stipulation, paragraph H had—gross sales, \$471,373. Do you recall approximately what [34] your inventory was that you carried?

A. No; I don't recall. Was the inventory infor-

(Testimony of Carl Pettibone.)

mation made available to you? We can get the information.

Q. Do you have the inventories? A. Yes.

Q. I show you what has been handed to me as——

Mr. Winter: Mark it for identification first, will you, please?

The Clerk: As defendant's Exhibit?

Mr. Winter: Yes.

A Spectator: I have another copy here.

Mr. Winter: Well, we can substitute a copy later.

The Clerk: Both as one exhibit?

Mr. Winter: Yes; that would be all right.

The Clerk: Defendant's Exhibit A-1 marked for identification.

Mr. Winter: Rather than taking the time, Counsel, we will offer Defendant's Exhibit A-1, which appears to be the balance sheet of the Student Book Store Corporation, from 1929. We are only interested up until and through the years involved.

Mr. Iversen: I have no objection.

Mr. Winter: And showing the net sales by departments. I think it might be helpful to the Court in this [35] matter.

The Court: And copies may be substituted for them.

The Clerk: Are they admitted?

The Court: They will be admitted.

The Clerk: Defendant's Exhibit A-1 admitted in evidence.

(Testimony of Carl Pettibone.)

(Defendant's Exhibit Number A-1 for identification admitted in evidence.)

By Mr. Winter:

Q. Where is the main book store located with reference to Pullman? Is it off the campus?

A. At the time it was built it was on the edge of the campus. The State College now owns land all the way around it. Its location is across the street from the girls' dormitory and, in another direction, across the street from the College Station Branch Post Office.

Q. The Student Book Corporation owns the building?

A. The Student Book Corporation owns the building and the land.

Q. And bought the building and the land from the earnings of the corporation?

A. That is right.

Q. Do people from—is it available for people downtown, other than students, to make purchases there? [36]

A. It is available to any purchaser, with relatively few taking advantage of it.

Q. But it is available. Are there students from other schools that come there and purchase? Particularly public schools? A. They may.

Q. They do as a matter of fact. You figure about four per cent of your sales are from other than students? A. That is an estimate.

Q. Do any—does anyone from, other than students, come up there to the restaurant?

(Testimony of Carl Pettibone.)

A. With the exception of faculty and students; very, very few.

Q. Visitors that might be visiting take advantage of it? They are not students?

A. That is right.

Q. If I was a student there and my parents came to visit me, I could take them there for meals?

A. Right.

Q. If I wanted to go there and make any sort of a purchase for guests, I could go into the book store?

A. You could.

Q. And, in other words, the store is open to the general public?

A. That is correct. [37]

Q. And no restrictions whatsoever on any purchase there? Would I get the same price that the students would get?

A. You would buy at identical prices.

Q. And if you were selling any articles below cost I would get them below cost?

A. You would.

Q. Do you sell some things below cost?

A. Yes, sir. I beg your pardon. Below list?

Q. No; I said below cost.

A. Only as they occasionally find themselves in the position of having to do so.

Q. It is your intention to make a profit on the merchandise?

A. That is the——

Q. What is your usual profit on the mark up? Do you have a fixed mark up on supplies?

A. No. It would be quite a flexible mark up with the mark up considerably less on the essential supplies than on the non-essential and, in the case

(Testimony of Carl Pettibone.)

of text books there is a fairly fixed mark up which actually results from the purchaser price schedule and discount schedule.

Q. And if I set up a book store right up next to it I could go into competition with your company?

A. That is right. [38]

Q. And I could make the same purchases of the same textbooks from the same people?

A. You would be able to purchase substantially most of the same items that the book store does with the limitations that the manufacturers might place on their retail outlets.

Q. In other words, any manufacturer has a right to limit the number of stores selling his merchandise and if you were there first he might deny me the right to sell it? Outside of your arrangements with the College, there was no connection between the College, so far as the business end of the business was concerned, was there? So far as the business end, outside of your stock ownership, the corporation was operated the same as any other corporation, wasn't it, by the manager? Do you understand what I mean?

A. Well, what you are saying is that it has been operated as though it had complete freedom of operation. The answer is no.

Q. You say it has not been operated as such?

A. No. It has been strictly a part of a college operation in the sense that it has been free to go ahead and do as it might wish in matters such as price and policy.

Q. Of course, the college could break its back



(Testimony of Carl Pettibone.)

if it wanted to, couldn't it, because of the nature of the operation? [39]

A. The college doesn't break the back of its operating units. It can cancel a school of social work, which it did do, and in the same way it could cancel the book store.

Q. I see. But does the manager—do you have free rein as to what purchases you should make?

A. Well, I don't believe any manager—I know while I was there I certainly worked completely closely with the Board of Trustees as well as the potential customers, and the best customers are the faculty in the final analysis because they determine what sales should be to the students.

Q. Is it contemplated that the restaurant will be moved to the Union building, which is under construction or is going to be built?

A. The restaurant will be moved into the Union building and arrangements have been made for the tearing down of the structure it is in at present.

Q. Do you make a profit on the restaurant?

A. No, sir.

Q. You haven't made a profit on the restaurant?

A. Well, as a general statement, it is true that the restaurant has never been profitable.

Q. Have you tried to make a profit on it?

A. For several years, at least, the answer is no. For example, coffee at the present time is five cents a cup. [40] You might be able to think in terms of making it five cents, or ten cents rather, as it is



(Testimony of Carl Pettibone.)

elsewhere in town. If we were seeking and striving for profit, coffee would be ten cents a cup.

Q. Well, you attempt to make a profit on your restaurant, don't you?      A. No, sir.

Q. Do you expect to make it up otherwise?

A. The books and supply department have been absorbing the loss from the restaurant.

Q. I see. Does the corporation have any contractual arrangement with the College or with the A.S.S.C.W. for water for its restaurant in the Union building?

A. Well, when the Union building is completed and the restaurant moves in, the restaurant becomes a part of the Union operation as distinguished from the book store operation.

Q. As distinguished from the book store operation?      A. Right.

Q. Do you have a book store in any other place except at the one location; downtown or anywhere?

A. No; those are the two locations.

Mr. Winter: I think that is all.

The Court: Mr. Pettibone——

The Witness: Yes? [41]

The Court: When this Union building is completed—I think the stipulation referred to it as a three hundred thousand dollar structure—it will be erected upon lands that the State of Washington now owns or which has title to?

The Witness: Well, the story of the land is interesting.

The Court: I don't care to go into details.

(Testimony of Carl Pettibone.)

The Witness: Well, it will be on State College property, correct.

The Court: And the building itself will be owned by whom?

The Witness: By the State College.

The Court: By the State College of Washington?

The Witness: Right.

The Court: And the net profits of this operation that you have had from year to year, have any part of them gone into this proposed plan or construction of the Union building?

The Witness: They have gone in through the dividends to the Associated Students, with Associated Students ear marking the funds for the Student Union purposes.

The Court: And for what other purposes have the net profits been used? [42]

The Witness: Well, to the best of my knowledge the Associated Students has used all of the dividend moneys expended, with the exception of the two earlier ones that Mr. Iversen made reference to, for plans and for lands and something in connection with the new Union building. And the fact is, the Union building structure only, the original structure, will cost two and a quarter million.

The Court: I may be confused, I thought the figures three hundred thousand dollars was in here somewhere.

The Witness: I don't recall a three hundred thousand dollar figure, or how it could be used here.

(Testimony of Carl Pettibone.)

The Court: Well, that is not so very material. Now, in stocking the merchandise, particularly in reference to laboratory supplies and stationery and text books and matters of that kind, did the company, when you were manager, have a free hand to stock anything he desired or was he directed in any way by the faculty?

The Witness: There was a very close working relationship between the manager and the member of the faculty in all those items which were used in class rooms. That is, student essentials, and that obviously goes on through the text book picture where there must be a very close working relationship if the store is to function as it [43] should.

The Court: Well, was there any endeavor to stock generally the merchandise such as a dealer would who was not on the campus?

The Witness: Well, there are many items carried by the store which are not essentials. The guest items and, in the case of stationery, only the buying habits of a college crowd dictate what stationery should be purchased, so that, in the non-essential items, the book store manager, under the supervision of the book store board, has exercised just a good merchants judgment.

The Court: Well, would that became a major factor in the sales, that portion that you designate as non-essentials?

The Witness: It is a very important part of sales. I can't give you any percentages. The text book volume is the book volume. The essential

(Testimony of Carl Pettibone.)

student supply volume is most substantial, but the students themselves actually recognize that the non-essential items are stocked for two principal reasons: One is that the students appreciate the nearness of the availability of the items; and the other they do seem to recognize is that any profits that are earned on the relatively higher mark up items will end up in the long run in the operation of, or the construction of, the new Union. [44]

The Court: Would you have been free, when you were manager of this store, to branch out into other lines of activity, such as agricultural implements and drug business, let us say, and general merchandising in clothing and shoes?

The Witness: No; the Board of Trustees would not have tolerated it and, if the point were stretched to the place where the Board of Trustees might tolerate it, I believe it would be stopped there because the president would stop it.

The Court: You mean you would have been restrained by reason of controls, either direct or indirect, by the college or members identified with the college?

The Witness: Yes.

The Court: I think that is all.

Q. (By Mr. Winter): You wouldn't have been restrained in the amount of candy you would buy for the students, would you? A. No, sir.

Q. Or any items which would be—which you might be—able to sell and make a profit on, would you?

(Testimony of Carl Pettibone.)

A. Well, you would still be restricted on the turn-over of all the items.

Q. Oh, sure, because of the location and where the book store was situated and who your customers were. That [45] is what you were limited by, wasn't it?

A. No.

Q. Chesterfield cigarettes is an item you will sell as many as you have customers to buy. If you thought a talking doll would be a big item to sell, to the students, you would be at liberty to sell that?

A. Well, there is a place where it would obviously stop, though.

Q. Yes; but you weren't limited by the items that a book store could sell?

A. No. If the University had no objection to a talking doll, we would stock a talking doll.

Q. And rug items, you were more or less of a book and drug store, weren't you, without the drugs?

A. Well——

Q. Cosmetics, for example?

A. Those items—those items the book store doesn't carry in the sense of the normal drug store. The perfumes and the drug items, they have a fifteen cent line to accommodate the kids.

Q. Something that would sell; that is what you were in business for?

A. But if the Board of Directors said, let's put in a good line, in terms of what you said, that is one thing; but, I don't believe the book store will ever stock that [46] type of thing, although I think that particular line would be a good selling line.



(Testimony of Carl Pettibone.)

Q. What about sporting goods; do you sell any sporting goods?

A. Well, the primary emphasis is on the necessary equipment. Beyond that, I would say relatively little.

Q. Well, you were interested in a quick turn over, weren't you?

A. Well, not in—in certain lines perhaps but not straight across the board.

Mr. Winter: That is all.

Mr. Iversen: I have no further questions.

The Court: I wanted to ask you this, Mr. Pettibone, by reason of the long years that you were with this activity, you became more or less familiar with similar activities in other parts of the United States and with other educational institutions, both private institutions and public institutions, of higher learning?

The Witness: Not at all with private institutions, but rather well with, particularly the West Coast, publishing institutions.

The Court: Well, were they engaged likewise in somewhat similar activities?

The Witness: The pattern on the West Coast, in the larger institutions, insofar as products handled is [47] about the same.

The Court: That is, in the Universities of Washington and Oregon?

The Witness: Yes, the pattern, in terms of operating unit differs. Variations all the way from the University of California where it is operated as a



(Testimony of Carl Pettibone.)

department of Associated Students to a distinct entity as the University of Washington and Washington College.

The Court: Are you familiar with the Stanford operation?

The Witness: Yes, the Stanford operation was a distinct and entirely outside business in terms of the mechanics in the way it was set up, as distinguished once again from California where it is meshed right into the Associated Students in that case.

The Court: That is all.

(Witness excused.)

Mr. Iversen: That is all of our witnesses for the Plaintiff and the Plaintiff rests.

Mr. Winter: The defendant rests, your Honor.

The Court: Well, I, of course, want to go over this stipulation quite carefully and check back on this evidence and these exhibits, but I think I will give you an opportunity to present such argument as you have and then this afternoon I can determine whether I shall make a disposition [48] of the case summarily or whether I should take it under advisement.

Mr. Iversen: If the Court please, I have a trial memorandum.

(Whereupon, argument was made by Counsel for Plaintiff.)

The Court: The situation that we have before

us, is there any fee levied upon enrolling students that is used in any way?

Mr. Iversen: I think in the Associated Students there is a fee but not in the Book Store. There is no charge so far as the book store is concerned. I believe there are dues payable to the Associated Students.

The Court: And is payment of those dues a prerequisite of being a customer of the book store?

Mr. Iversen: No. As a matter of fact, anybody can go into the book store and buy something. Actually, all but four per cent of the business is done with students and faculty, but there is no membership arrangement so far as the book store itself is concerned.

(Whereupon, further argument was made by Counsel for Plaintiff.)

The Court: I think we will suspend now until two o'clock. Court will be at recess until two o'clock.

(Whereupon, at 12:00 o'clock, noon, a recess was [49] had until 2:00 o'clock, p.m., May 18, 1950, at which time the following proceedings were had, to wit.)

The Court: All right, Mr. Iversen.

(Whereupon, further argument was made by Counsel for Plaintiff.)

(Whereupon, argument was made by Counsel for Defendant.)

The Court: Do you have anything further, Mr. Iversen?

(Whereupon, further argument was made by Counsel for Plaintiff.)

The Court: I think I am prepared at this time to make a disposition of this case.

At first blush it seems to be an extremely complicated matter, but that is more or less true of all these Internal Revenue cases. It is extremely difficult, if not impossible, to find as a precedent some case where the facts are on all fours with the one being given consideration at the moment. And I am not surprised, that with the diligence of counsel on both sides as well as some research done by the Court and my law clerk, that we haven't been able to find anything that falls squarely in with the facts as they are in the instant case.

The question of interpretation of the statute becomes a matter of significance and importance and I think [50] it would be agreed upon by both sides that interpretation of a set of facts such as we have here is required to be liberal rather than strict, and I shall keep that rule in mind in making a disposition of this case.

The action is to recover taxes paid under protest, including excess profits tax and corporate income taxes and capital stock tax too, I think, though it is a small item for the years 1943, 1944 or 1945, 1946 and 1947.

The stipulated facts fairly cover the evidence in this controversy, but the oral testimony and the

documents offered—identified and offered while Mr. Pettibone was testifying—have a tendency to clarify these stipulated facts and make less difficult to determine findings by the Court.

The law, insofar as it applies here, is this section 101, sub-division 6, of the Internal Revenue Code. I should have that citation. 26 U.S.C.A. And it provides that “corporations organized and operated exclusively . . .”—and I shall omit except as it applies here—“for educational purposes, no part of the net earnings of which accrue to the benefit of a private share holder or individual . . .”—and omitting—“would be exempt.”

I shall omit the part not in issue.

And we have to determine, from the whole facts here, whether the corporation—the book store—was [51] organized and operated exclusively for educational purposes; and, further, that its earnings—and they have been substantial throughout the later years—did not accrue to a private individual.

On the latter proposition there isn't any dispute. None of the earnings of the book store have, nor even could under its set up—accrued to the benefit of a private owner. All of its earnings, whether they had to go that way or not, have gone to a tax exempt corporation, and that is why this morning I asked if you had in mind, I think it was, sub-division 11 that dealt with tax exemptions on income. Is that 11?  
14?

(Law Clerk nods affirmatively.)

The Court: Because, at the time that I was

giving consideration to this I didn't have the benefit of the agreed statement of facts before me.

But, it is very clear, so far as the facts go, and the Court has no hesitancy in making the finding, that none of this money that was earned has ever gone to a private individual or gone to a profit making corporation.

The question then, first, that we have to consider, it seems to me, is: Is this corporation one that by liberal construction a Court can find to be an educational corporation; and I use the term "liberal" advisedly.

If there were no State College in Pullman, [52] then, certainly, the activities of this corporation would have nothing to do with education.

But, the history of its creation and its activities would seem to indicate that it came into being solely for the purpose of furthering the activities of the College itself and that it has continued to be so operated.

Preceding the corporate structure here involved, the Students Book Store, we have the corporation structure of the Associated Students. As disclosed by the evidence here the Commissioner quite wisely found that that was an activity of an educational type and character and there is no profit from it that could accrue to any private individual. It was the Associated Students then, and through their activities and by the use of their accumulations which were small in amounts back in 1923, I think was the year, that the incorporation of the book store took place.



Now, the articles of incorporation, we will say, were drafted, by whoever drew them, following the formal language of a commercial corporation. But, there isn't even the remotest reference that it was ever intended that this corporation could engage in commercial activities not identified with the College. And the facts are unequivocal that all of its activities of a commercial nature were identified with the College, excepting the four per cent which were incidental sales to the great volume of sales [53] throughout the years.

I asked the question of counsel for the Commissioner as to what his view would be, if the Associated Students, without the organization of this corporate structure, had engaged in the various activities that the book store had been doing, in references to taxes. Maybe the Court was a little bit unfair in asking that question without giving counsel an opportunity to carefully weigh and consider it. At any rate, I am in full accord with his answer, that there would have been no liability.

Now then, I go just one step beyond that and, from the evidence here, attempt to ascertain just what this corporate structure is—the Book Store—and, again from the stipulated facts plus the documentary evidence—find it is nothing more or less than the alter ego of the Associated Students in this general activity. And the Associated Students, at least since 1947, are nothing more or less than a conduit through which the earnings of the Book Store Corporation will pass to the State College, an exempt institution. In fact, an institution created, I



think, by the Constitution of Washington itself which provides for a land grant.

Well, with such findings of fact—and I bear in mind fully this Stanford case because it comes more nearly to being on all fours than any of the numerous cases that have been cited or been examined—with such findings of [54] fact—I can not do other than find that the Plaintiff is here entitled to be placed in an exempt status and to recover from the Commissioner in this case.

In interrogating counsel on one side or the other side, I made reference to the dissenting opinion in the Stanford case. Judge Healy, still on the bench and probably one of the outstanding judges on the Court of Appeals in the United States Ninth Circuit, found that from the facts there exemption should be allowed to the book store. Of course, I can't accept that as the law. I am not like the Commissioner. I don't feel that I have the right to fly in the face of precedent by the Appellate Court, so I must accept as law the opinion of the majority of that court. But, they make this distinction—the majority of the court do—and it is a marked distinction: That there were earnings that directly passed back to the various individuals who furnished the original capital by which it could operate. When a profit was shown, they received repayments. Here the moneys are paid to the Associated Students by virtue of the regulations and make up a part of its fund and can never be paid back to any of the students nor any individual and,

in the whole set up, they ultimately inure to the College itself.

Then, in addition to what I have said, it is a fact, and has been since the year that Dr. Holland [55] wrote that letter—and I have forgotten whether that was 1933 or 1934——

Mr. Iversen: 1933.

The Court: ——and, whether he had a right to demand a power of veto, which was the equivalent of a control, or not, it was granted to him at that time and since that time the College has—the Regents and the College through the President have had—a control of the entire situation, of how the funds should be handled and what the policy should be in conduct of this business.

I would like for you to prepare fairly complete findings of fact in this case, Mr. Iversen, and submit them to Mr. Winter. And, I want to say in this case, as I do in so many others, that I am perfectly happy to see the Commissioner test the wisdom or lack of wisdom and judgment or lack of good judgment on the part of the trial court by taking the case to an Appellate Court.

I am not advising further litigation but I appreciate the importance of this as dealing with a somewhat similar institution in every larger educational institution in America and, if I am in error, that can be corrected. If I am not in error and Congress thinks that it is an unfair exemption, they can correct it by legislative enactment.

I think that is all. [56]

(Statement by Counsel for Defendant.)

The Court: Well, if there is nothing further, this Court will be adjourned until 10:00 o'clock tomorrow morning.

(Whereupon, at 3:10 o'clock p.m., May 18, 1950, hearing in the within-entitled cause was adjourned.)

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed November 21, 1950.

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PLAINTIFF'S EXHIBIT No. 1

“Students Book Corporation

“Pullman, Washington

“Articles of Incorporation

“Know All Men by These Presents, That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of Washington, and we hereby certify:

“First. That the name of said company is The Students Book Corporation.

“Second. That the purposes for which it is formed are to carry on a general book, stationery,

sporting goods, refreshment and a general mercantile business, to buy and sell real estate, to engage in a general insurance business.

“Third. That the place where its principal place of business is to be transacted shall be at Pullman, in the County of Whitman, State of Washington.

“Fourth. That the term for which it is to exist is Fifty years from and after the date of its incorporation.

“Article 5

“Articles of Incorporation amended ‘That the number of trustees shall be seven.’ Minutes of the Board of Trustees, November 30, 1927.

Names	Residence
“E. C. Colpitts.....	Pullman, Washington
“L. Meeker .....	Pullman, Washington
“M. Dunning.....	Pullman, Washington
“M. K. Snyder.....	Pullman, Washington
“F. A. Weller.....	Pullman, Washington

“Article 6

“Articles of Incorporation amended. Board of Trustees minutes, January 25, 1928. ‘The authorized capital stock be increased to \$1,000,000.00.’

“In Witness Whereof, We have hereunto set our hands and seals this 21st day of February, 1923.

“E. C. COLPITTS,

“L. MEEKER,

“M. DUNNING,

“M. K. SNYDER,

“F. A. WELLER.

“State of Washington,  
“County of Whitman—ss.

“On this 21st day of February, 1923, before me, M. S. Jamar, a Notary Public, in and for the State of Washington, personally appeared E. C. Colpitts, M. Dunning, M. D. Snyder, and F. A. Weller, personally known to me to be the individuals whose names are subscribed to the within instrument, and they each duly acknowledged to me that they executed the same for the uses and purposes therein mentioned.

“Given under my hand and official seal this 21st day of February, 1923.

“M. S. JAMAR,  
“Notary Public in and for the State of Washington, Residing at Pullman, Wash.”

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## PLAINTIFF'S EXHIBIT No. 2

“By-Laws of the Students Book Corporation

“(Adopted April 18, 1923)

“Article 1 (Name and Object)

“Section 1. The name of this corporation shall be The Students Book Corporation.

“Section 2. The purposes for which it is formed are to carry on a general book, stationery, sporting goods, refreshment, and a general mercantile business, to buy and sell real estate, to engage in a general insurance business.



“Article II. (Stock)

“Section 1. The capital stock of said corporation shall be \$60,000.00 divided into 600 shares of the par value of \$100.00 each. (Incr. to \$100,000 in 1928.)

“Section 2. Amended. Dividends shall be declared from the surplus profits of the Corporation at such times as the Board of Trustees shall direct, and no dividends shall be declared that will impair the capital of the Corporation.

“(Amended December 16, 1936.)

“Article III. (Stockholders)

“Section 1. Amended.

The stockholders of this corporation shall be seven in number. All stockholders shall be appointed by the president of the Associated Students of the State College of Washington with the approval of the Board of Control of said body. Each stockholder so appointed shall hold one share of stock. The Associated Students of the State College of Washington shall hold all but seven shares of the total stock subscribed for and paid up. Each stockholder shall have one and only one vote irrespective of number of shares held.

“(Amended May 4, 1933.)

“Section 2. Amended.

Two of the stockholders shall be members of the faculty of the State College of Washington, teaching in some department of the College in Pullman,



four of the stockholders shall be undergraduate students enrolled in at least twelve collegiate hours. The four undergraduate students stockholders shall be appointed from among the three upper classes; in such manner that there shall be a representative from each class, Sophomore, Junior, and Senior. The seventh stockholder shall be the Graduate Manager. Provided that no other member of the Board of Control of the Associated Students except the Graduate Manager shall be a stockholder in this corporation.

“(Amended October 19, 1927.)

“Article IV. (Trustees)

“Section 1. Amended. October 15, 1947.

The governing board of this corporation shall be a Board of Trustees nine in number, elected by the stockholders at their regular annual meeting in October.

“Section 2. The officers of this corporation shall be elected by the Board of Trustees.

“Section 3. The trustees shall be elected annually and shall hold office until their successors are elected and qualified.

“Section 5. The Board of Trustees shall have power to employ such persons as may be necessary in the conduct of the business of the corporation and fix their compensation. The Board of Trustees shall employ a manager for the conducting of the business of the corporation, fix compensa-

tion of said manager, and require him to furnish a bond at the discretion of the Board.

“Article V (Officers)

“Section 1. The officers of this corporation shall be a President, Vice-President, Secretary, and Treasurer-Auditor.

“Section 2. The officers shall be elected annually by the Trustees at their annual meeting.

“Section 3. Duties of Officers.

a. The President shall preside at all meetings of the Board of Trustees, and shall transact such duties as shall become incumbent on the office.

b. The Vice-President shall act in the absence of the President.

c. The Secretary shall keep the minutes of all meetings, certify the same, be custodian of the seal of the corporation, and affix said seal to such documents as require the same, to take charge of the records of the corporation, conduct correspondence of the corporation and perform other such duties as the Board of Trustees shall from time to time direct. It being understood that the minute book, corporation seal, stock record, and all other records of the corporation shall be kept in the vaults of the corporation.

“Section 3. -c- Amended—(by the addition of the following) The Secretary shall promptly submit

to the president of the college for approval all minutes of actions of the Board of Trustees and of the Board of Stockholders. Unless notice of disapproval is furnished within ten days after said minutes have been delivered to the president of his secretary approval shall be considered given.

“(Amended September 21, 1933.)

d. The Treasurer-Auditor shall have charge of the financial affairs of the corporation and shall audit the books of the manager and secretary annually or at any other time that the Board of Trustees may direct.

#### “Article VI (Meetings)

“Section 1. The regular annual meeting of the stockholders shall be held on the third Wednesday of October of each year at 4:30 p.m. in the office of the corporation.

“Section 2. The Trustees shall hold their annual meeting on the third Wednesday of October of each year at 4:30 p.m. in the office of the corporation. The day and time of the regular monthly meetings of the Board of Trustees shall be fixed at the regular annual meetings. Special meetings of the Board of Trustees or the Stockholders may be called at any time at the discretion of the President of the Board or on demand of two members.

“Section 3. The President and Secretary of the Board of Trustees shall act as Chairman and Secretary, respectively of all meetings of the stockholders.

“Article VII (Amendments)

“Section 1. These bylaws may be amended at any regular meeting of Stockholders or at any special meeting called for that purpose. A majority vote of the Stockholders shall be necessary to pass an amendment.”

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PLAINTIFF'S EXHIBIT No. 3

Treasury Department

Washington 25

Office of Commissioner  
of Internal Revenue

Nov. 12, 1947

Address Reply to

Commissioner of Internal Revenue

And Refer to

IT:P:ER

RD

Students Book Corporation,

1000 Thatuna Street,

Pullman, Washington.

Gentlemen:

Reference is made to the evidence submitted for use in reconsidering your status for Federal income tax purposes.

On March 9, 1928, you were held to be entitled to exemption from Federal income tax under the provisions of section 231 (6) of the Revenue Act of 1926 and the corresponding provisions of prior revenue acts and on August 6, 1935, the previous

ruling was reversed and you were held not to be entitled to exemption under section 101(6) or 101 (14) of the Revenue Act of 1934 and the corresponding provisions of prior revenue acts. You now claim exemption under sections 101(6) and 116 of the Internal Revenue Code.

The evidence shows that you were incorporated under the laws of the State of Washington in 1923. Your purposes, as stated in your articles of incorporation, are "to carry on a general book, stationery, sporting goods, refreshment and a general mercantile business, to buy and sell real estate, to engage in a general insurance business." Your outstanding capital stock consisting of 770 shares, excepting single qualifying shares, was owned and held until March 1, 1947, by the Associated Students of the State College of Washington, an organization which has been held to be exempt from Federal income tax. The Associated Students acquired \$25,000.00 of this stock in return for assets which you acquired at the time of your incorporation and \$52,000.00 as stock dividends.

You conduct a store at which supplies, books and other merchandise are sold to the students of the State College of Washington, at reasonable prices, and services are provided without charge or at nominal cost to students of the State College of Washington. Your earnings in excess of amounts needed for working capital and expansion purposes, have been distributed as dividends to the Associated Students of the State College of Washington. During the years 1926 to 1929, inclusive, dividends were paid in stock while in 1933 and some years subse-



quent thereto cash and security dividends have been paid. During 1933 and 1934 the dividends were paid for specific purposes, that is, to finance first a publication of the Associated Students for distribution to students and second, a painting of President Emeritus E. A. Bryan which was presented to the State College of Washington. Other than those two instances, the policy has been followed of making available funds for the building of a Student Union Building, adjacent to or on the present campus of the State College of Washington. It is stated that in executing the policy dividends have been declared at such times as the Associated Students have requested money to implement the program for the construction of the Student Union Building; that these dividends have been transferred to the Bursar of the State College who in turn has disbursed the funds for the purchase of lands, title to which is vested in the State College and held for student purposes; and that funds in excess of these disbursements have been invested in marketable securities pending use in construction of a Student Union Building.

On March 1, 1947, under a trust agreement your outstanding stock was turned over by the Associated Students of the State College of Washington in trust to the Board of Regents of the State College of Washington. The agreement provides that the principal and net earnings of the trust fund are to be used only in furtherance of the purposes for which the Associated Students was organized.

Your bylaws, as amended, provide that you shall be governed by a board of seven trustees elected by



your stockholders who, in turn, shall be members of the Associated Students of the State College of Washington appointed by the president of that organization with the approval of its Board of Control, each stockholder to hold one share of your stock and to be entitled to one vote. The bylaws further provide that your stockholders shall be two members of the faculty of the State College of Washington, four undergraduate students and your Graduate Manager who may also be a member of the Board of Control of the Associated Students.

Section 101(6) of the Internal Revenue Code provides for the exemption of:

“Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.”

Prior revenue acts carry similar provisions.

In order to be exempt under the above-quoted section of law, an organization must be both organized and operated exclusively for one or more of the specified purposes. The Bureau does not now recognize that an organization is exempt from Federal income tax merely because its income is distributed to an exempt organization or is devoted to exempt

purposes. Neither does the ownership of the capital stock of a business corporation by an exempt organization entitle the corporation to exemption although through the stock ownership the exempt organization does, of course, exercise control over the affairs of the corporation.

In view of the foregoing, and since you are organized for general business purposes, it is the opinion of this office that you cannot be said to be organized and operated exclusively for any of the purposes specified in the section of the law quoted above. It is held, therefore, that you are not entitled to exemption from Federal income tax under the provisions of Section 101 (6) of the Internal Revenue Code and the corresponding provisions of prior revenue acts. Furthermore, there is no other provision of law under which you may be held exempt. Accordingly, you are required to file Federal income tax returns on Form 1120.

Bureau ruling of August 6, 1935, is hereby affirmed.

Your case has been reviewed by the Chief Counsel for the Bureau who concurs in the conclusion reached.

Your status for capital stock tax purposes will be made the subject of a separate communication.

The collector of internal revenue for your district is being advised of this action.

Very truly yours,

/s/ GEO. J. SCHOMMAN,  
Commissioner.

## PLAINTIFF'S EXHIBIT No. 4

Articles of Incorporation of Associated Students of  
the State College of Washington  
Know All Men by These Presents:

That we, citizens of the State of Washington, and residents of Pullman, County of Whitman, and State of Washington, and being members of the unincorporated association known as the Associated Students of the State College of Washington, desire to incorporate ourselves under the provisions of the law of the State of Washington entitled "An act to provide for the Incorporation of Associations for sociable, charitable and educational purposes" approved March 21st, 1895, do hereby agree and certify as follows, to wit:

## I.

The name of the corporation shall be "Associated Students of the State of Washington."

## II.

The purposes and objects for which this corporation is formed are as follows:

1. To promote, manage, control and encourage all kinds of field and athletic sports, and promote and encourage the sport, pleasure, exercise and reaction of its members: to arrange, promote, manage, and control athletic contests, and for this purpose to purchase, hold, acquire, buy, sell, lease, mortgage and hypothecate both real and personal property, to erect buildings or other structures necessary and proper for the purposes before mentioned; to construct, equip and maintain a student hospital on the

campus of the State College of Washington for the use and benefit of the students at said College, to erect, equip and maintain Student Union buildings, to edit and publish such publications as may be deemed necessary for the advancement, information and education of students at said College. To borrow and loan money and do all and any of the things which may be requisite, necessary and proper in and about the carrying out of the purposes and objects hereinbefore mentioned.

2. To promote and encourage education and culture among the members of this corporation and to this end to promote and encourage literary efforts of every kind, name and nature and description. To manage, promote and conduct educational and literary contests among the members of this corporation and between this corporation and other like bodies in this state and in other states and territories and any foreign countries.

3. To promote and encourage scientific study and investigation in all the sciences and to this end to promote and encourage contests and exhibitions among the members of this corporation and between the members of other like bodies in this and all other states and territories.

4. To promote and encourage musical education and entertainments and to this end to promote and encourage musical entertainment and performances among the members of this corporation and other like bodies in this state and any other state and territory.

5. To promote and encourage debating and oratory and to promote, manage, and encourage any and all kinds of student activities of the State College of Washington and to this end to have power and authority to do any and all things which are necessary and convenient or incident thereto.

6. To make, execute and enter into contracts of every kind and character with individuals, firms, associations and corporations, private, public and municipal and bodies politic and with the Government of the United States and with any state or territory or colony or district thereof and with any foreign country.

7. To do each and everything necessary, suitable or proper for the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated or which shall at any time appear expedient for the protection or benefit of its members either as holders of or interested in any property, and it being the intention that the objects and purposes herein specified shall in no wise be limited or restricted by reference to or inference from the terms of any other clause of this or any other paragraph of this instrument, but that the objects, purposes and powers specified in each of the clauses of this second paragraph shall be regarded as individuals objects and powers.

8. This corporation may hold real and personal estate and may hire, purchase or erect suitable building for its accommodation to be devoted to the purposes set forth in this agreement of association,



and may receive and hold in trust or otherwise sums received by gifts, or bequests to be devoted by it to such purposes and for the purpose of the corporation shall have power to issue its promissory notes, bonds or other obligations to be secured by mortgage upon its real estate and other property in such manner as may be provided by its by-laws.

III.

This corporation shall be located at the State College of Washington, in the City of Pullman, in the County of Whitman, State of Washington.

IV.

This corporation shall not have any capital stock.

V.

The time of the existence of this corporation shall be fifty years from the date of its incorporation unless sooner dissolved according to law.

VI.

All matters or things in any way pertaining to the affairs of this corporation wherein it has not been otherwise herein provided shall be subject to the regulation and control of the By-Laws adopted by the members of this corporation.

VII.

All registered students who have paid the students annual fees and the Graduate Manager shall be members of this corporation.



In Witness Whereof, we have hereunto set our hands in triplicate this 22nd day of June, 1928.

/s/ ERWIN D. McDOWELL,

/s/ AGNES DRISCOLL,

/s/ VIRGINIA PHIPPS,

/s/ R. H. KILLIAN,

/s/ EARL V. FOSTER.

State of Washington,  
County of Whtiman—ss.

This certifies that on this 22nd day of June, 1928, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Erwin D. McDowell, Agnes Driscoll, Virginia Phipps, R. H. Killian, and Carl V. Foster, to me known to be the individuals described in who executed the foregoing instrument, acknowledged to me that they signed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and notarial seal the day and year first above written.

/s/ THOMAS WEILL,

Notary Public in and for the State of Washington,  
Residing at Pullman.

No. 66148

Articles of Incorporation  
of the  
Associated Students of the  
State College of Washington

Place of business Pullman

Time of existence 50 years

Capital Stock, \$ None

State of Washington, ss.

Filed for record in the office of the Secretary of State July 10, 1928, at 2:01 o'clock p.m. Recorded in Book 152, Page 290-291, Domestic Corporations.

/s/ FRANK HINKLE,

Secretary of State.

Filed at request of Thomas Neill, Lawyer, Pullman, Washington.

Filing and recording fee, \$7.45.

License to June 30, 19. . . . , \$ Exempt.

Certificate mailed Oct. 20, 1928, to above address.

Indexed.

Compared.

Certificate

This certifies that we the undersigned, subscribers to the attached Agreement of Association, held our first meeting on June 30th, 1928, at 7 o'clock p.m. pursuant to notice given to us seven days prior thereto.

That at said meeting by-laws were adopted, and we were elected trustees and officers of said associa-

tion to hold office until the first meeting of the members to be held on the first Tuesday of October, 1928.

That Erwin D. McDowell was elected president, Robert H. Killian vice president and Agnes Driscoll secretary.

That the attached is true triplicate copy of the Agreement of Association with the names of the subscribers thereto.

/s/ ERWIN D. McDOWELL,  
President and Trustee.

/s/ AGNES DRISCOLL,  
Secretary and Trustee.

/s/ R. H. KILLIAN, Trustee.

/s/ VIRGINIA PHIPPS,  
Trustee.

/s/ EARL V. FOSTER,  
Trustee.

Subscribed and sworn to before me this 30th day of June, 1928.

/s/ THOMAS NEILL,  
Notary Public, Residing at  
Pullman, Washington.

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PLAINTIFF'S EXHIBIT No. 5

“ASSCW Constitution  
“Preamble to the Constitution

“We, the Associated Students of the State College of Washington, in order to bring about in students an appreciation and understanding of democratic

values and processes through participation in student government; to develop in the student a realization of his rights, responsibilities, and his common interest with the rest of the College community; to provide practical training for all students in citizenship activities; to present and interpret student attitudes and opinions to the teaching faculty and the College Administration; to provide through student publications a means of keeping students fully informed on matters of vital concern to them, of developing group consciousness and college community morale, and of providing a medium for free expression of student opinion; and to provide the opportunity to experiment in student activity fields which provide informal educational values to all students and which cannot be financed by the College Administration have established this Constitution.

#### “Article I—Name

“Section 1: The name of this organization shall be the ‘Associated Students of The State College of Washington.’

#### “Article II—Authorities and Powers

“Section 1: This association is established under the authority of the Board of Regents of The State College of Washington and the exercise of its functions shall be subject to such conditions and limitations as the Board of Regents may from time to time prescribe.

“Section 2: Authorities and powers of the Associated Students of The State College of Washington shall be exercised by the Board of Control or by its

agents or agencies established under the Constitution.

“Section 3: Action of the Board of Control shall be subject to the approval of the President of the State College and disapproval may be appealed by the Board of Control to the Board of Regents.

### “Article III—Membership

“Section 1: All regularly enrolled undergraduate students and students of short courses of The State College of Washington who pay the fees as determined by the Board of Control with the approval of the Board of Regents and who abide by the Constitution and By-laws of this association shall have full membership rights in the Association.

“Section 2: Associate membership shall be granted to regularly enrolled graduate students upon payment of regular dues. Such membership shall grant the holder to all privileges or regular membership except the right to vote and hold office in the Association.

### “Article IV—Officers

“Section 1: The executive officers of this Association shall be a President, a Vice-President, and a Secretary. They shall hold office for one year. The Comptroller of the State College shall be ex-officio treasurer.

“Section 2: To be eligible for election to an executive office a student must have senior standing

at the beginning of the fall term as determined by the office of the Registrar and must have at least a 2.00 grade average for the number of credit hours in which he has been enrolled in this institution.

“Section 3: The powers and duties of the officers of this Association shall be as follows:

(a) The President shall preside at all meetings of this Association and the Board of Control. He shall inspect and sign all documents of the Associated Students as required by law or as directed by the Board of Control, and perform all other duties pertaining to that office.

(b) The Vice-President shall assume and execute all the duties of the President in the absence or inability of that officer, and he shall automatically be chairman of the Election Board. In case the office of President is at any time vacated, the Vice-President shall automatically become President for the unexpired term, and the Board of Control shall appoint a new Vice-President.

(c) The Secretary shall keep a written record of all meetings of the Associated Students and the Board of Control, and shall notify all members of meetings of the Board of Control. He shall perform such additional duties as assigned to him by the Board of Control.

#### “Article V—Board of Control

“Section 1: The Board of Trustees of this Association shall be known as the ‘Board of Control of the Associated Students.’



“Section 2: The following shall be voting members of the Board of Control:

(1) the President, Vice-President, and Secretary of the Association;

(2) one Senior Independent men's representative and one Senior Fraternity men's representative;

(3) one Senior Independent women's representative and one Senior Fraternity women's representative;

(4) one Junior Independent men's representative and one Junior Fraternity men's representative;

(5) one Junior Independent women's representative and one Junior Fraternity women's representative;

(6) one Sophomore Independent representative and one Sophomore Fraternity representative.

“Section 3: To be eligible for the above offices students shall have proper class standing at the beginning of the fall term as determined by the office of the Registrar and must have a 2.00 grade average for the number of credit hours in which they have been enrolled in this institution.

“Section 4: The following shall be non-voting members of the Board of Control:

(1) the President of the Associated Women Students;

(2) a student representative of the Athletic Council selected by the Athletic Council;

(3) the Editor of the Evergreen;

(4) an Administrative Advisor.

“Section 5: The Board of Control may select three additional non-voting members from the College staff.

“Section 6: Powers and duties of the Board of Control shall be to:

(1) adopt or approve all budgets of the Association with annual review of salaries of all ASSCW administrative staff and all salaried appointive and elective student body positions;

(2) authorize an audit by a disinterested certified public accountant, the faculty or the alumni, of all ASSCW records at the close of each fiscal year; a copy of the audit shall be given to (a) the office of the Comptroller, (b) the Board of Control, (c) the Evergreen, in which a summary statement shall be published;

(3) establish all policies and have general supervision of all affairs, property, and activities of the Association;

(4) have charge of the disbursement of funds;

(5) establish and appropriate membership fees;

(6) approve all committee reports;

(7) appoint all students to represent ASSCW;

(8) provide for the Board of Publications;

(9) provide for the election of a Yell King;

(10) make, alter, or amend By-Laws for the Association by a two-thirds vote of the total voting membership of the Board of Control.

(11) supervise the management and activities of the Student Union Building;

(12) provide for all rules governing ASSCW and class elections; and

(13) have such other general control of the student interests and activities as may be assigned it by the Board of Regents of The State College of Washington.

“Section 7: Should a vacancy occur in any ASSCW office, the Board of Control shall appoint a successor, except as provided for in Article IX of this Constitution.

“Section 8: A majority of the voting membership of the Board of Control shall constitute a quorum for the transaction of any business except as provided for in Article V, Section 6, (10).

“Section 9: Members of the Board of Control shall assume office at the beginning of the fall term of each year and shall hold office for one year.

“Article VI—Administrative Advisor

“Section 1: The Administrative Advisor shall be appointed by the Board of Control with the advice and consent of the College Administration.

“Section 2: The Administrative Advisor’s salary shall be determined by the Board of Control and shall be paid from the funds of the ASSCW.

“Section 3: The Administrative Advisor shall be bonded for a sum that shall be determined by the Comptroller.

“Section 4: The powers and duties of the Administrative Advisor shall be determined by the Board of Control as set forth in the By-Laws.

“Section 5: The Administrative Advisor shall be a member of the administrative staff of The State College of Washington.

“Article VII—Meetings

“Section 1: The annual meeting of the Association shall be held in May of each year and one other meeting shall be held during the fall term.

“Section 2: Special meetings may be called at any time during the year by the President of the Association.

“Article VIII—Elections

“Section 1: Candidates for election shall be duly chosen at an open party caucus according to the By-Laws.

“Section 2: Elections shall be conducted accord-

ing to the Election Rules as provided in the By-Laws. These rules shall be published in the Evergreen at least one week preceding the party caucuses, and again one week preceding the election. These rules are subject to change by action of the Board of Control, provided that the rules shall not be changed between the publication preceding nominations and the election unless the change is directed by the President of the College.

“Section 3: All candidates shall be elected by a majority vote.

“Section 4: Parties without class representation on the Board of Control shall formulate their caucus in accordance with all applicable parts of this article, but they shall not be eligible to enter candidates for class representation.

“Section 5: This article shall not be construed as prohibiting additional party caucuses from entering on the ballot as sticker candidates the names of other candidates who meet scholastic and other requirements for the respective offices.

#### “Article IX—Repeal and Recall

“Section 1: Any act of an officer, committee, or organization existing under this Constitution, may be repealed or amended by a majority vote of the Association at a special election to be called by the Board of Control upon presentation of a written petition signed by one-fifth of all members of the Association.

“Section 2: Any officer of this Association may be recalled by a majority vote at a special election. The Board of Control shall, upon the presentation of a written petition, signed by one-fifth of all the members of the Association, call such a special election. In case of a recall, the office shall be filled by a special election called by the Board of Control within one week of the date of the recall.

#### “Article X—Seal

“Section 1: The Corporate Seal of this Association shall be in the form of a circle with the words ‘Associated Students of The State College of Washington’ in circumferential annulus, and the words ‘Corporate Seal’ in the center.

#### “Article XI—Amendments and Revisions

“Section 1: This Constitution may be amended or revised by a majority vote of ballots cast on the proposed modifications at any regular ASSCW election or special election called for that purpose.

“Section 2: Amendments and revisions shall be presented to the members of the Association in an election called by an affirmative vote of at least eight members of the Board of Control or upon petition of one-fifth of the members of the Association.

“Section 3: Amendments and revisions shall be presented to the Board of Control at least two weeks before election and shall be printed in full in the Evergreen one week before election day.



“Article XII—Body to Interpret the  
Constitution and By-Laws

“Section 1: Should it be deemed necessary in the opinion of the Board of Control to have any section of the Constitution or By-Laws of this Association interpreted, upon the request of that body the President of the College shall appoint three members of the faculty, who shall meet with the President and one other member of the Board of Control of the ASSCW for the purpose of interpreting any section or sections in question. The decision of this body shall be conclusive and shall be filed with the copy of the official Constitution. It is understood that the Board of Control may request such an interpretation, either upon its own motion, or at the request of not less than ten (10) students who may petition the Board of Control requesting such action.”

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# PLAINTIFF'S EXHIBIT No. 6

## Student Store Account

Reimbursed Items Paid by Associated Students of the State College of Washington  
Expenditures From July 1, 1943, Through March 31, 1948

Ch. No.	Date	Name	Purpose	Voucher No.	Amount
221	1943				
	7/28	College Photography Studio			\$ .93
	8/31	Ogden Beeman	Architect		333.00
	9/ 6	College Photography Studio			7.70
	10/ 1	Ogden Beeman	Architect		333.00
	18	Potlatch Yards, Inc.	Celotex		4.43
	11/ 1	Ogden Beeman	Architect		333.00
	4	College Photography Studio			33.34
	20	M. Eldora Damewood	Stenographer		11.25
	12/ 1	Ogden Beeman			333.00
	1944				
	12/31	Ogden Beeman			333.00
	1/ 7	Ass'n. of College Unions			5.00
	7	P. H. Holdsworth	Survey		183.28
	11	College Photography Studio			22.50
	11	College Photography Studio			10.55
	31	Ogden Beeman			333.00
	2/ 4	College Photography Studio			8.10
	21	Harry Weller	Drafting		96.00

Ch. No.	Date	Name	Purpose	Voucher No.	Amount
	3/ 1	Ogden Beeman	.....		333.00
	6	M. L. Maloney	.....Engineering Serv.		125.00
	6	Pullman Herald	.....12 copies		.62
	10	College Photography Studio	.....		23.70
	31	Two tickets to Lansing, Mich.	.....		302.98
	31	Ogden Beeman	.....		333.00
	4/ 7	Washington Hotel	.....Meals		10.42
	7	W. L. Maloney	.....Engineering Fee		200.00
	8	N. P.	.....Tickets to Mich.		12.82
	10	Registrar	.....Contact Prints		11.25
	12	College Photography Studio	.....		51.65
	5/ 1	Ogden Beeman	.....		333.00
	4	College Photography Studio	.....		9.10
	5	Travel Exp. to Mich.	.....		197.67
	10	Livingstone Elder	.....Architect Fee		481.80
	11	Harry C. Weller	.....Exp. to Mich.		31.15
	25	Hutchison Studio	.....		85.73
	31	Ogden Beeman	.....		333.00
	6/30	Ogden Beeman	.....		333.00
227	7/13	Porter Butts	.....Consultation Serv.	7924	75.00
	8/ 1	Ogden Beeman	.....July Salary	7948	333.00
	8/12	W. L. Maloney	.....Engineering Serv.	7981	100.00
	30	Roy E. Fredrick	.....Test. Found. Cond.	7983	207.50
	30	College Photography	.....Stu. Union Prints	7988	15.40

9/ 1	Glenn Wegner	Aug. Salary	7993	100.00
1	Ogden F. Beeman	Aug. Salary	7997	333.00
6	Porter Butts	Consulting Serv.	8012	50.00
15	W. L. Maloney	Consulting Serv.	8029	125.00
15	Dept. of Agriculture	Blue Prints	8031	18.50
15	WSC Registrar's Office	Contact Prints	8033	6.30
18	J. M. O'Donnell	Drafting Corporate Deed	8036	3.00
10/ 2	Glen W. Wegner	Sept. Salary	8065	250.00
2	Ogden F. Beeman	Sept. Salary	8071	333.00
5	Raymond L. Betts	Sept. Salary	8080	23.00
5	Dept. of Architecture	Blue Prints	8090	16.70
10	Student Book Corp.	Supplies	8099	41.04
31	Thomas L. Hansen	Oct. Salary	8159	333.33
31	Glen W. Wegner	Oct. Salary	8160	250.00
31	Philip E. Keene	Oct. Salary	8161	312.50
31	Ogden F. Beeman	Oct. Salary	8167	333.00
11/ 2	Raymond L. Betts	Oct. Salary	8174	53.50
7	Livingstone Elder	Consult. Service	8189	20.00
7	Students Book Corp.	Supplies	8195	68.32
7	In. Pacific Stamp Wks.	Stamps	8200	5.51
7	Dept. of Architecture	Blue Prints	8203	17.30
14	Livingstone Elder	Consult. Service	8216	20.00
12/ 1	Ogden F. Beeman	Nov. Salary	8248	333.00
1	Philip E. Keene	Nov. Salary	8254	312.50
1	Glenn W. Wegner	Nov. Salary	8255	250.00
1	Thomas L. Hansen	Nov. Salary	8256	333.33
4	Raymond L. Betts	Nov. Salary	8260	38.50

Ch. No.	Date	Name	Purpose	No. Voucher	Amount
6		Standard Paint Co.	Supplies	8292	22.46
6		Livingstone Elder	Consult. Service	8293	55.00
6		W. L. Maloney	Engineering Serv.	8298	200.00
6		Dept. of Architecture	Blue Prints	8299	20.75
6		Office of Registrar	Contact prints	8301	1.29
22		DeWitt Griffin & Associates	15% of total fee	8358	1800.00
29		Ogden F. Beeman	Dec. Salary	8372	333.00
29		Philip E. Keene	Dec. Salary	8377	312.50
29		Glenn W. Wegner	Dec. Salary	8378	250.00
29		Thomas L. Hansen	Dec. Salary	8379	333.33
31		Registrar's Office	Corr. on Voucher #	8301	5.13
1/11		Dept. of Architecture	Blue Prints	8509	19.40
11		Livingstone Elder	Services	8510	120.00
11		Students Book Store	Supplies	8514	26.86
31		In. Pacific Stamp Wks.	Supplies	8550	3.33
2/ 1		Thomas L. Hansen	Jan. Salary	8561	333.33
1		Glenn W. Wegner	Jan. Salary	8562	250.00
1		Philip E. Keene	Jan. Salary	8563	312.50
1		Ogden F. Beeman	Jan. Salary	8564	333.33
1		Robert Lamberger	Jan. Salary	8571	19.24
1		Raymond L. Betts	Jan. Salary	8572	17.75
8		W. L. Maloney	Consultant Eng.	8618	400.00
8		Registrar's Office	Contact Prints	8623	2.25
8		Dept. of Architecture	Blue Prints	8624	18.30

Ch. No.	Date	Name	Purpose	Voucher	
				No.	Amount
12		Student's Book Store	Supplies	8664	59.42
3/ 1		Thomas L. Hansen	Feb. Salary	8755	333.33
1		Glenn W. Wegner	Feb. Salary	8756	250.00
1		Philip E. Keene	Feb. Salary	8757	312.50
1		Ogden F. Beeman	Feb. Salary	8758	333.33
2		Raymond L. Betts	Feb. Salary	8767	37.00
2		Robert Lamberger	Feb. Salary	8768	193.80
21		Clyde M. Ludberg Co.	For estimating cost	8876	500.00
21		W. L. Maloney	Feb. Service	8877	225.00
21		Dept. of Architecture	Blue Prints	8880	18.35
23		Standard Print Co.	Blue Prints	8884	2.30
4/ 2		Thomas L. Hansen	Mar. Salary	8938	333.33
2		Glenn Wegner	Mar. Salary	8939	250.00
2		Philip E. Keene	Mar. Salary	8940	312.50
2		Ogden F. Beeman	Mar. Salary	8941	333.33
3		Standard Print Co.	Prints	8960	3.08
5		W. L. Maloney	Engineering Fee	8980	150.00
6		Robert Lamberger	Drafting	8986	192.38
9		Livingstone Elder	Consult. Serv. Fee	9014	25.00
10		ASSCW Change Account	Trav. Exp. to Seattle	9016	67.60
10		Students Book Store	Supplies	9019	20.93
13		Stanley A. Smith	Trav. Exp. to Calif.	9031	72.49
20		DeWitt & Griffin Associates	Eng. Services	9047	3790.00
20		Raymond L. Betts	Drafting Serv.	9049	15.00



20	Morell & Nichols Inc.	Landscape Eng.	9052	40.00
20	Dept. of Architecture	Blue Printing	9056	6.90
30	Mrs. Geo. Severance	Quitclaim	9079	15.00
5/1	Thomas L. Hansen	April Salary	9097	333.33
1	Glenn W. Wegner	April Salary	9098	250.00
1	Philip Keene	April Salary	9099	333.33
1	Ogden F. Beeman	April Salary	9100	333.33
3	Dept. of Architecture	April blue print.	9125	7.15
3	W. L. Maloney	Engineering Serv.	9127	175.00
3	Ray L. Betts	April wages	9112	10.00
3	Robert Lamberger	April wages	9114	185.25
7	Registrar's Office	Contact tracing	9146	.72
16	Whitman Title Co.	Limited Liability Report	9159	10.00
16	Standard Printing Co.	Prints	9173	9.85
6/1	Thomas L. Hansen	May Salary	9236	333.33
1	Glenn W. Wegner	May Salary	9237	250.00
1	Philip E. Keene	May Salary	9238	333.33
1	Ogden F. Beeman	May Salary	9239	333.33
4	Robert Lamberger	May Salary	9265	218.74
7	Raymond Betts	May Salary	9270	22.00
12	W. L. Maloney	May Eng. Fee	9344	175.00
18	Standard Printing Co.	Blue printing	9353	9.54
18	Pullman Branch Bank	Escrow Fee	9354	8.75
18	Registrar's Office	Contact printing	9356	20.97
30	Thomas L. Hansen	June Salary	9397	333.33
30	Glenn W. Wegner	June Salary	9398	250.00

Ch.	No.	Date	Name	Purpose	Voucher No.	Amount
		30	Philip E. Keene	June Salary	9399	333.33
		30	Ogden F. Beeman	June Salary	9400	333.33
		30	Robert Lamberger	June wages	9412	212.33
259		1943		Less donation on Receipt #	4134	10.00
		3/ 3	Washington State College	Prints	6561	2.79
		6/ 1	WSC Photo Shop	Prints	6773	.56
		5	Stanley Smith	Travel expenses	6801	42.30
		23	Stanley Smith	Travel expenses	6911	22.97
		7/ 1	Earl V. Foster	Travel expenses	6937	19.60
		1946				
		1/ 7	Dept. of Architecture	Prints	613	6.75
		9	WSC	Nov. Arch. wages	620	972.26
		31	Assn. of College Unions	Membership	733	5.00
		3/ 7	W. L. Maloney	Engineering Fee	1097	375.00
		9	Morell & Nichols	Engineering Fee	1125	240.00
		21	Hutchison Studio	Display Material	1174	5.67
		4/ 1	W. L. Maloney	Engineering Fee	1241	475.00
		10	Whitman Co. Treas.	Tax on property	1325	154.57
		19	Dept. of Architecture	Prints	1352	33.15
		26	Earl V. Foster	Travel expense	1411	150.00
259		30	Shaw & Borden Co.	Tracing cloth	1414	72.65
		5/ 2	WSC	Mar. Arch. wages	1448	926.71
		6/ 7	W. L. Maloney	Engineering Fee	1795	375.00

## PLAINTIFF'S EXHIBIT No. 7

“Students Book Corporation  
Pullman, Washington  
Trust Agreement

“This Indenture, made and entered into at Pullman, Washington, this 1st day of March, 1947, by and between The Associated Students of the State College of Washington, a corporation, herein called ‘the grantor’ and the Board of Regents of the State College of Washington, herein called ‘the trustee,’ Witnesseth:

“Whereas, the Students Book Corporation was incorporated under the laws of the State of Washington in May, 1923, for the purpose of carrying on a general book, stationery, sporting goods, refreshment and mercantile business in Pullman, Washington, for service to the students of the State College of Washington, and,

“Whereas, all capital stock of said corporation is owned by the grantor corporation excepting single qualifying shares held by certain members of the grantor as determined by elections of the grantor’s membership, and,

“Whereas, the said Students Book Corporation has, since its inception, maintained and followed a policy of selling supplies, books, and other merchandise to the Students of the State College of Washington, at reasonable prices, and to provide other services without charge or at nominal cost to students of the State College of Washington, and,

“Whereas, the retained earnings of the Students Book Corporation have consistently, since its incep-

tion, been used for the purpose of expanding its physical assets to give better service to the Students of State College of Washington, and

“Whereas, earnings of the Students Book Corporation in excess of requirements for physical expansion and betterment have been invested in lands to be used solely for student purposes, which lands have been given to the State of Washington as a gift, and,

“Whereas, earnings and dividends over and above the uses aforesaid have been delivered to the Bursar of the State College of Washington by the grantor to be used solely for student purposes and particularly for the use of the Students of the State College of Washington, or title to which will be vested in the State of Washington, and,

“Whereas, it is the policy of the Board of Trustees of the Students Book Corporation to operate its business in the interest of and for the benefit of the State College of Washington, and to use all of its net income for such purposes, which policy has been consistent and uniform since the said month of May, 1923, and,

“Whereas, it is the desire of the grantor that this policy be perpetuated and that the operation of the Students Book Corporation be permanently for the benefit and betterment of and by Students of the State College of Washington.

“Now, Therefore, the grantor does hereby assign and set over unto the trustee all of the capital stock of the Students Book Corporation under the following terms and conditions, to wit:

“The trustee shall exercise all incidents of own-

ership of this capital stock for the welfare and best interest of the Students of the State College of Washington. During the existence of the grantor, the principal and interest earnings of this trust shall only upon recommendation of the Board of Control of the Associated Students of the State College of Washington be used only in furtherance of the purposes for which the Associated Students was organized.

“The trustee does hereby agree that it will comply with the condition of this trust and that it hereby recognizes the obligations and duties of this trust and that it shall hold said shares of stock under the terms hereof.

“No bond shall be required of this trustee nor shall it be required to render any accounting other than to keep complete and adequate records in the office of the Bursar of the State College of Washington pertaining to the income and receipts from this trust asset and of the expenditures thereof.

“In Witness Whereof . . .”

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## PLAINTIFF'S EXHIBIT No. 8

### The Constitution (ASSCW)

#### Article 1—Name

Section 1. The name of this organization shall be the “Associated Students of the State College of Washington.”

#### Article II.—Membership

Section 1. All regularly enrolled undergraduate



students of the State College of Washington and Students of short courses who shall pay the fees hereinafter provided for and who abide by the Constitution and By-Laws of this Association, and the Graduate Manager shall be members of this organization.

### Article III.—Officers

Section 1. The officers of this Association shall be a President, a Vice-President and a Secretary. The Bursar of the State College shall be ex-officio treasurer. They shall hold office for one school year.

Section 2. (As amended March 12, 1942) To be eligible to be elected to the office of President, Vice-President, Secretary, Senior Independent man, Senior Independent woman of this Association, a person must be a student who at the beginning of the year in which that person is to hold office shall have to his or her credit in the State College of Washington, at least ninety (90) hours and not more than one hundred and twenty-eight (128) hours earned here or elsewhere, and must have as many grade points as the number of credit hours in which he or she has been enrolled at this institution.

Section 3. The President shall preside at all meetings of this Association and all meetings of the Board of Control. He shall sign all documents, contracts, notes, bonds, mortgages, deeds, and leases as authorized by the Board of Control, and perform all other duties pertaining to that office.

Section 4. (As amended March 12, 1942) To be



eligible to be elected to the office of Junior Independent man, Junior Fraternity man, Junior Independent woman and Junior Sorority woman of the Association, a person must be a student who at the beginning of the year in which that person is to hold office, shall have to his or her credit in the State College of Washington, at least sixty (60) hours and not more than eighty-nine (89) hours earned here or elsewhere, and must have as many grade points as the number of credit hours in which he or she has been enrolled at this institution.

Section 5. The Vice-President shall assume and execute all the duties of the President in the absence or inability of that officer, and he shall automatically be Chairman of the Election Board. In case the office of President is at any time vacated, the Vice-President shall automatically become President for the unexpired term, and the Board of Control shall elect a temporary Vice-President, who shall occupy that office until his successor is elected.

Section 6. (As amended March 12, 1942) To be eligible to be elected to the office of Sophomore Independent representative or Sophomore Fraternity (Sorority) representative of this Association, a person must be a student, who at the beginning of the year in which that person is to hold office, shall have to his or her credit in the State College of Washington, at least thirty (30) hours and not more than fifty-nine (59) hours earned here or elsewhere, and must have as many grade points as the number of credit hours in which he has been enrolled at this institution.

Section 7. (As amended March 12, 1942) To be eligible to be elected to the offices of Senior Fraternity man, Senior Sorority woman, Junior Fraternity man, Junior Sorority woman or Sophomore Fraternity (Sorority) representative, a person must be a recognized member or pledge of a social Fraternity or Sorority. To be eligible to be elected to the offices of Senior Independent man, Senior Independent woman, Junior Independent man, Junior Independent woman and Sophomore Independent representative, a person must Not be a recognized member or pledge of a social Fraternity or Sorority. Any student elected to any of the offices enumerated in this section who changes his affiliation from Independent to Fraternity (Sorority) or vice-versa, during the term of office, is automatically dropped from office. In the event that the affiliation of a candidate is contested, any twenty-five (25) members of the Association may petition the Board of Control, within four (4) days after nomination, to determine whether or not that candidate is a recognized member or pledge of a social fraternity or sorority. If the affiliation of an officer named in this section is contested during his or her term of office, the status of that officer shall be determined by the Board of Control.

Section 8. (As amended) Scholastic hours for the purpose of determining eligibility to office shall be certified by the Registrar upon request from the Graduate Manager's office. Any student elected to any of the above offices who fails to meet these

scholastic requirements at the time of taking office is automatically dropped from office.

Section 9. Scholastic hours for the purpose of determining eligibility to office shall be certified by the Registrar.

#### Article IV.—Board of Control

Section 1. (As amended March 12, 1942) The Board of Trustees of this Association shall consist of sixteen (16) members to be known as the “Associated Students Board of Control.”

Section 2. (As amended March 12, 1942) The following shall be members of the Board of Control:

(a) The President, Vice President and Secretary of this Association.

(b) One senior Independent men’s representative and one senior Fraternity representative.

(c) One senior Independent women’s representative and one senior Sorority representative.

(d) One junior Independent men’s representative and one junior Fraternity representative.

(e) One junior Independent women’s representative and one junior Sorority representative.

(f) One Sophomore Independent representative and one sophomore Fraternity or Sorority representative.

(g) The Graduate Manager shall act as graduate representative by virtue of his office.

(h) The president of the Associated Women Students shall act as member ex-officio of the Board.

(i) A student representative from the Athletic Council appointed by the Athletic Council shall be a member ex-officio of the Board.

Section 3. It shall be the duty of the Board of Control to adopt or approve all budgets, and to audit all accounts. It shall have the general supervision of all affairs, property, and activities of this Association, award letters, select depositories for the Association's funds, have charge of the disbursements of all funds, establish membership fees, and appropriate the same, and shall have such other general control of the student interests and activities as may be assigned to it by the Board of Regents of the State College of Washington.

Section 4. Should a vacancy occur in the Board of Control, the President, with the approval of the Board, shall appoint someone to fill the vacancy. Should a vacancy occur in the Athletic Council the Board of Control, as soon as possible, appoint someone to fill the vacancy, which appointment shall be approved by the President of the State College before the appointee takes office.

Section 5. The Board of Control shall appoint one senior and three junior managers for football, baseball, basketball, and track. One senior shall be appointed as swimming manager, one as tennis manager and one as debate manager.

Section 6. A majority of the Board of Control shall constitute a quorum for the transaction of any business.

### Article V.—Athletic Council

Section 1. The Athletic Council shall consist of the following members:

(a) The President of the State College, who shall be ex-officio Chairman of the Council and shall have power to absolute veto in all acts of the Council.

(b) Three (3) members of the faculty of the State College of Washington to be appointed by the President of the State College, one of whom shall be the Athletic Director.

(c) Three (3) members of the Alumni Association.

(d) Three (3) undergraduates, who shall be elected at the regular spring A.S.S.C.W. election.

Section 2. The personnel of the Athletic Council shall be approved by the President of the State College of Washington before entering upon any of its duties.

Section 3. No member of the Athletic Council shall vote by proxy except non-resident alumni, who may give proxy to some other member of the Council.

Section 4. The Athletic Council shall approve all athletic awards before recommending to the Board of Control.



Article VI.—Graduate Manager

Section 1. The Graduate Manager shall be appointed by the Board of Control with the advice and consent of the Athletic Council.

Section 2. The Graduate Manager shall be a graduate of the State College of Washington. His salary shall be determined by the Board of Control and shall be paid from the funds of the Association. The Graduate Manager shall be secretary of the Athletic Council and keep a record of all matters of the Council, receive reports from student managers, keep a record of all games and contests in which those representing the State College of Washington shall participate; keep a record of all contracts made by the State College of Washington with managers of other schools and when from any cause he ceases to be Manager, he shall turn over to the Secretary of the Association all records of his office.

Section 3. The Graduate Manager shall schedule all athletic contests subject to the approval of the Athletic Council and have full charge and control of all athletic meets connected with the College.

Section 4. The Graduate Manager shall authorize the sale of tickets for all activities requiring a sale.

Article VII.—Meetings

Section 1. The regular meetings of the Association shall be held once each month.

Section 2. The annual meeting of members of



the Association shall be held on the first Tuesday of May each year.

Section 3. Special meetings may be called at any time during the year by the President.

#### Article VIII.—Elections

Section 1. (As amended May 18, 1944) Candidates for elections shall be duly chosen at an open party caucus for each student party three weeks preceding elections.

Section 2. (As amended May 29, 1941) Any student, to be eligible as a candidate for an elective office in the Associated Students, must have as many grade points as the number of credit hours in which he has been enrolled at this institution. Following nominations of officers, the Graduate Manager's Office shall check the names of those nominated with the Registrar's Office. Candidates with less grade points than credit hours shall not have their names included on the ballot.

Section 3. (As amended May 29, 1941) Elections shall be conducted according to the election rules which shall be listed in the Supplementary Code of Regulations and kept on file in the office of the Graduate Manager. These rules shall be published in the *Evergreen* at least one week before the regular nomination meeting, and again in the issue of the *Evergreen* preceding the election. These rules are subject to change by action of the Board of Control, provided that the rules shall not be changed between the publication preceding nomi-

nation and the following election, unless by the President of the College.

Section 4. (As amended May 29, 1941) At the time and place of holding the election, the names of those placed in nomination shall be the candidates for the respective offices, and a majority vote of all members voting shall be necessary to elect. This section shall not be construed as prohibiting voters from entering on the ballot as sticker candidates the names of other candidates who meet scholastic and other requirements for the respective offices.

Section 5. (As amended May 29, 1941) The eligibility of the candidates for the various offices is governed by Sections 2, 4, 6, 7, 8 of Article III and Section 1 (d) and 2 of Article V in Constitution of the Association.

Section 6. (Addition of May 18, 1944) Each party shall have an open party caucus three weeks preceding elections to choose candidates for the elections.

Each dormitory, Fraternity and Sorority house shall have one voting representative elected from his or her group for each fifteen students living in, or affiliated with, the group, with a minimum of one representative.

Students not living in dormitories, Fraternity or Sorority houses, shall obtain representation in the same proportion through recognized off-campus organizations with which they are affiliated.

No student may obtain representation through more than one organization.

Student body class representatives of each party elected the previous year, shall preside at the caucus of their respective parties.

Elected representatives to the caucus may vote by proxy authorized by his or her group.

Section 7. (Addition of May 18, 1944) There shall be at least two candidates for election from each party for each class representative office.

### Article IX.—Vacancies

Section 1. Any vacancy occurring in any office from any cause shall be filled by the Board of Control.

### Article X.—Repeal and Recall

Section 1. Any act of an officer, committee, or organization existing under this Constitution, may be repealed or amended by a two-thirds vote of the members present at any regular meeting of the Association.

Section 2. Any officers of this Association may be recalled by a majority vote at a special election. The Board of Control shall, upon the presentation of a written petition, signed by one-third ( $\frac{1}{3}$ ) of the members of the Association, call such a special election. In case of a recall, the office shall be filled by a special election called by the Board of Control within one week of the date of recall.

### Article XI.—Seal

Section 1. The Corporate Seal of this Association shall be in the form of a circle with the words,

“Associated Students of the State College of Washington,” in the circumference, and the words, “Corporate Seal,” in the center.

## Article XII.—Amendments

Section 1. This Constitution may be amended by a majority vote of ballots cast at any regular A.S.S.C.W. election or special election called for that purpose.

Section 2. Amendments shall be presented to the members of the Association by the affirmative vote of at least eight (8) members of the Board of Control, or upon petition of one-third ( $\frac{1}{3}$ ) of the members of the Association.

Section 3. Amendments shall be proposed at least two weeks before election and shall be printed in full in the Evergreen one week before the election day.

## Article XIII.—Body to Interpret the Constitution And By-Laws

Section 1. Should it be deemed necessary in the opinion of the Board of Control to have any section of the Constitution or By-Laws of this Association interpreted, upon request of that body, the President of the College shall appoint three members of the faculty, who shall meet with the President and Vice-President of the A.S.S.C.W. for the purpose of interpreting the section or sections in question. The decision of this body shall be conclusive and shall be filed with the copy of the official Constitution. It is understood that the Board of Control may request such an interpretation, either upon its own motion, or at the request of not less

than ten (10) students who may petition the Board of Control requesting such action.

The undersigned testifies that the foregoing copy of the A.S.S.C.W. Constitution is true and reliable as printed in the Evergreen in the Monday, January 13, 1947, issue.

/s/ JEANNE D. JOHNSON,  
A.S.S.C.W. Administrative  
Adviser.

May 26, 1950.

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PLAINTIFF'S EXHIBIT No. 9  
(Copy)

Amendments to Article II, By-Laws of Students  
Book Corp.

Effective October 10, 1947

Section 1—Amended

The stockholders of this corporation shall be nine in number. Seven stockholders shall be appointed by the Board of Control of the Associated Students of the State College of Washington. One of the stockholders, the Business Manager of the State College of Washington, shall serve as an ex-officio member of the Students Book Corporation. The ninth stockholder shall be the Administrative Advisor. Each stockholder shall hold one share of stock. The Board of Regents of the State College of Washington shall hold all but nine shares of the total stock subscribed for and paid up. Each stockholder shall have one and only one vote irrespective



of the number of shares held. (Amended October 10, 1947.)

Section 2—Amended

Two of the stockholders shall be members of the faculty of the State College of Washington, teaching in some department of the College in Pullman. Five of the stockholders shall be undergraduate students enrolled in at least twelve collegiate hours. The five undergraduate student stockholders shall be appointed from among the three upper classes, in such a manner that there shall be a representative from each class, Sophomore, Junior, and Senior. One of the stockholders, the Business Manager of the State College of Washington, shall serve as an ex-officio member of the Students Book Corporation. The ninth stockholder shall be the Administrative Advisor. Provided that no other member of the Board of Control of the Associated Students except the Administrative Advisor shall be a stockholder in this corporation. (Amended October 10, 1947.)

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PLAINTIFF'S EXHIBIT No. 10

The State College of Washington

Office of the President

Pullman, Washington

May 30, 1933

Mr. Ivan Putman

President, Board of Trustees

Student Book Corporation

Pullman, Washington

Dear Mr. Putman:

I was informed this morning that the proposed



amendment to the by-laws of the Associated Students relating to change in the method of control of the finances of the Student Book Corporation was defeated.

The members of the Board of Regents are held responsible by the Governor and the citizens of this state for the management not only of the institution but also of any groups, corporate or non-corporate, that have been organized in connection with the institution. I think that the great majority of the students appreciate the fact that the Board of Regents and executive officers of this institution could not escape this responsibility even if they cared to do so.

But just now there is one specific suggestion I should like to make to the Trustees of the Student Book Corporation and I am quite sure it will receive the unanimous approval of the Board. I would suggest that the Bursar of the college be made Treasurer of the Bookstore. The details of this matter should very properly be left with the Trustees themselves.

Very sincerely yours,

/s/ E. O. HOLLAND,  
President.

eoh ls

PLAINTIFF'S EXHIBIT No. 11

The State College of Washington  
Office of the President  
Pullman, Washington

June 5, 1933

Carl A. Pettibone, Esq.  
Manager, Student Book Corporation  
Pullman, Washington

Dear Mr. Pettibone:

Your communication of the third instant enclosing minutes of the meeting of the stockholders and the Board of Trustees of the Student Book Corporation was received and I took the liberty last Saturday, June third, of reading the entire communication, including the minutes, to the Board of Regents. Fortunately all the members of the Board were in attendance at that time.

In the opinion of the members of the Board, the proposed amendment to your by-laws relative to submitting minutes of actions of the Board of Trustees to the President of the college for his approval is entirely satisfactory. The provision as to the five-day limit is a desirable one because the work of the Students Store should not be delayed from any neglect upon the part of the President's Office. Upon the other hand, the members of the Board of Regents are of the opinion that the recognition of the responsibility of the institution as represented by the Board of Regents and the President is properly safeguarded with the proposed amendment.

Therefore, I am happy to say that the members

of the Board of Regents and I are in full accord with your suggested amendment.

May I say in this connection that those student and faculty members who have carried the responsibility of the management of the Students Store for at least fifteen years—possibly longer—deserve the commendation not only of the Board of Regents but also of the public. As a consequence of this fine cooperation between the students and the faculty, and excellent management on the part of both, the assets of the Students Store are large, the management has been superior, and the services rendered have undoubtedly been very satisfactory.

I am glad that the Trustees of the Student Book Corporation and the Board of Regents are in full accord as to how a few additional safeguards will be helpful.

Very sincerely yours,

/s/ E. O. HOLLAND,

President.

eoh ls

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## PLAINTIFF'S EXHIBIT No. 12

### ASSCW By-Laws

#### Article I—Authorities and Powers

Section 1: Authorities and powers of the Associated Students of The State College of Washington shall be exercised by the Board of Control or by its agents or agencies established under the Constitution or By-Laws. Actions of the Board of Control

or its agents or agencies shall not be valid, or in effect if disapproved by the President of the State College, but any such disapproval may be appealed by the Board of Control to the Board of Regents of The State College of Washington.

## Article II—Dues and Memberships

Section 1: Regular membership dues shall be collected from each undergraduate student attending The State College of Washington. All regular and special dues shall be determined by the Board of Control with the approval of the Board of Regents.

Section 2: These regular dues shall entitle each member to full membership rights of the Association.

Section 3: Associated membership shall be granted to regularly enrolled graduate students upon payment of regular dues. Such membership shall grant the holder to all privileges of regular membership except the right to vote and hold office in the Association.

## Article III—Committees

Section 1: The Board of Control shall appoint the student personnel of all the student and student-faculty committees which are necessary to plan and carry out the functions of the Association. The Board shall determine the number, the function, and the membership of these committees.

Section 2: All committees of the Associated Students of The State College of Washington must file

a complete and written report to the Board of Control within three weeks after the completion of their work unless the Board of Control should stipulate otherwise. These reports shall contain complete account of work undertaken and results obtained by the committee as a whole, and of each member of the committees where the work has been individual, as well as recommendations and suggestion for future similar committees.

Section 3: All reports shall be approved by the Board of Control and then placed in the permanent files in the General Manager's office.

#### Article IV—Students' Bookstore Board

Section 1: There shall be appointed a Students' Bookstore Board which shall consist of the General Manager, two faculty members, one senior student, one junior student, one sophomore student, and one student member-at-large.

Section 2: The student members of the Bookstore Board shall be appointed at the beginning of the school year by the Board of Control.

Section 3: The duties of the Board shall be to act as a Board of Trustees, according to the By-Laws of the Students' Bookstore Corporation.

Section 4: Vacancies on the Students' Bookstore Board shall be filled as they occur, in order that the appointments as stated in Section 1 may not be disturbed. Unless student members resign or are



guilty of gross neglect, they shall be reappointed from year to year.

## Article V—Student Union Board

Section 1: There shall be appointed a Student Union Board which shall consist of the following members:

(1) one senior student, one junior student, one sophomore student, and one student member-at-large;

(2) three faculty members:

(3) the Union manager, one member of the administrative Student Personnel staff, the General Manager, and the Student Activities Counsellor, all of whom shall be non-voting members of the Board.

Section 2: The student members of the Student Union Board shall be appointed by the Board of Control at the beginning of each school year. Vacancies shall be filled as they occur, in order that the appointments as stated in Section 1 may not be disturbed. Unless student members resign or are guilty of gross neglect, they shall be reappointed from year to year.

Section 3: Faculty members and the Student Personnel member shall be appointed by the Board of Control with the approval of the President of the College. Faculty members shall serve for a three-year term. A new faculty member shall be ap-



pointed at the same time as the new sophomore student is appointed.

Section 4: Duties of the Student Union Board shall be:

(1) to be responsible for the preparation of a yearly budget for the Student Union Building which shall be subject to final approval by the Board of Control;

(2) to present each year an itemized statement of expenditures and income to the Board of Control;

(3) to determine all policies and activities concerning the Student Union Building and its management to the best interest of ASSCW, such policies being subject to the final approval of the Board of Control.

#### Article VI—The Athletic Council

Section 1: The Athletic Council shall consist of:

(1) the President of The State College of Washington, who shall be ex-officio chairman of the Council;

(2) three faculty members;

(3) three alumni members;

(4) three student members;

(5) the General Manager, who shall be ex-officio and non-voting secretary of the Council.

Section 2: The student members shall be ap-

pointed by the Board of Control immediately following the inauguration of new officers and shall include one sophomore student, one junior student, and one senior student. They shall hold office for not more than three years.

Section 3: Vacancies on the Athletic Council shall be filled as they occur, in order that the appointments as stated in Section 2 may not be disturbed. Unless student members resign or are guilty of gross neglect, they shall be reappointed from year to year.

Section 4: The personnel of the Athletic Council shall be approved by the President of The State College of Washington before entering upon any of its duties.

Section 5: All members shall be eligible to vote by proxy when not in residence.

Section 6: A two-thirds majority of the voting members of the Athletic Council shall constitute a quorum for the transaction of business.

Section 7: The Secretary of the Athletic Council shall keep a permanent record of all meetings of the Athletic Council and notify all members of meetings at least 24 hours prior to meeting time.

Section 8: Powers and duties of the Athletic Council shall be:

(1) to approve all athletic awards before submitting them to the Board of Control for final approval;

(2) to appoint a student representative, who

shall be ex-officio to the Board of Control, at the first regular meeting each year;

(3) to select the coaching staff;

(4) to recommend the coaching staff salary schedules to the Board of Control for final approval annually;

(5) to determine athletic policy for the Associated Students of The State College of Washington.

### Article VII—Publications

Section 1: The official publications of the Associated Students shall be the Evergreen, the Chinook, and all other official printed material.

Section 2: There shall be a Board of Publications which shall consist of the President of the Associated Students, who shall act as chairman ex-officio, the Head of the Department of Journalism, the editors-in-chief and business managers of the Evergreen and Chinook, and the General Manager. The Director of Student Publications shall be non-voting, ex-officio secretary.

Section 3: The powers and duties of the Board of Publications shall be:

(1) to appoint the editors-in-chief, associate editors, managing editors, business managers, and assistant business managers for all publications of the Associated Students, and to submit these appointments to the Board of Control for approval;

(2) to recall from any office any persons holding the above appointive positions on any publication in event of unsatisfactory scholarship or gross neglect of duties on the publication. They shall be recalled by a 5/7 vote of the Board of Publications, and their recall shall be approved by the Board of Control;

(3) to appoint persons to fill any vacancies which might occur in the above appointive positions, and submit such appointments to the Board of Control for approval;

(4) to secure official verification from the College Registrar that each candidate and appointee meets the scholastic requirements of the College;

(5) to decide on the advisability of any new publications and submit a recommendation concerning such publications to the Board of Control.

Section 4: The Board of Publications shall draw up a Code of the Duties in which the relationships and responsibilities of the Board as a whole and of its various members shall be defined. There shall be an annual review of the Code, in May, by the outgoing Board.

Section 5: The editor-in-chief of each publication shall, at the beginning of his term of office, present statement of his operating policies to the Board of Publications for approval, and, if approved, he shall be obligated to follow these policies. Such

policies may be amended with the consent of the Board of Publications in order to meet unforeseen situations which may arise.

Section 6: In the advent of a stalemate between the Board of Control and the Board of Publications concerning any of the appointments described in Section 2, a joint meeting of the two Boards, for discussion of the problem, shall automatically follow.

Section 7: The Board of Publications shall meet once each month. Special meetings may be called by the chairman at the request of any member of the Board of Publications.

Section 8: Salaries of the editors-in-chief and business managers of all publications of the Associated Students shall be determined by the Board of Control.

### Evergreen

Section 9: The Editor-in-Chief of the Evergreen shall be appointed to serve for one semester, but he shall be eligible for reappointment. Editors shall be selected in May of each year for the summer and fall semesters and in January for the spring semester. Appointees must have a working record of at least four semesters on the Evergreen and must have senior standing upon taking office.

Section 10: The Managing Editors shall be appointed to serve for one semester and shall have at least junior standing upon assuming office. Man-



aging Editors shall be selected in May and January of each year and shall have a working record of at least two semesters on the Evergreen.

Section 11: The Business Manager shall be appointed to serve for one school year and shall have senior standing upon assuming office. He shall be selected in May of each year and shall have a working record of at least four semesters on the Evergreen.

Section 12: Assistant Business Managers shall be appointed in May to serve for one year. They shall have at least junior standing and a working record of at least two semesters on the Evergreen upon assuming office.

Section 13: The lower editorial staff members of the Evergreen shall be appointed to their positions by the Editor-in-Chief of the Evergreen, who shall have the power of removal. The lower members of the business staff of the Evergreen shall be appointed by the Business Manager of the Evergreen, who shall have the power of removal.

Section 14: There shall be one Managing Editor and one Assistant Business Manager for each issue of the Evergreen published each week.

Section 15: The powers and duties of the Editor-in-Chief shall be:

- (1) to have general supervision of the publication of the Evergreen;
- (2) to preside at all meetings of the staff;



(3) to direct the editorial policy of the paper ;

(4) to recall from office any lower staff personnel in event of unsatisfactory scholarship or gross neglect of duties.

Section 16: The powers and duties of the Business Manager shall be:

(1) to have charge of the finances of the Evergreen ;

(2) to approve jointly, in writing, with the General Manager, all bills incurred by the Evergreen ;

(3) to collect all debts due the paper and turn this income over to the General Manager.

Section 17: A copy of the monthly financial statement of the Evergreen shall be filed in the office of the ASSCW president.

### Chinook

Section 18: The Editor-in-Chief of the Chinook shall be appointed in May of each year. He shall have a working record of at least four semesters with the publications and shall have at least a junior standing when appointed.

Section 19: The Associate Editors of the Chinook shall be appointed in May of each year. They shall have a working record of at least two semesters with the publication and shall have at least sophomore standing when appointed.

Section 20: The Business Manager of the Chinook

shall be appointed in May of each year. He shall have a working record of at least four semesters with the publication and shall have at least a junior standing when appointed.

Section 21: The Assistant Business Managers shall be appointed in May of each year. They shall have a working record of at least two semesters with the publication and shall have at least sophomore standing when appointed.

Section 22: The lower editorial staff members of the Chinook shall be appointed to their positions by the Editor-in-Chief of the Chinook, who shall have the power of removal. Lower members of business staff of the Chinook shall be appointed by the Business Manager of the Chinook, who shall have the power of removal.

Section 23: the powers and duties of the Editor-in-Chief shall be:

- (1) to have general supervision of the publishing of the Chinook;

- (2) to preside at all meetings of the editorial staff;

- (3) to direct the editorial policy of the Chinook;

- (4) to aid in the proper training of Associate Editors.

Section 24: The powers and duties of the Business Manager shall be:

(1) to have charge of the finances of the Chinook;

(2) to approve jointly, in writing, with the General Manager, all bills incurred by the Chinook;

(3) to collect all debts due the Chinook and turn this income over to the General Manager.

Section 25: Each edition of the Chinook shall be known by the year in which it is published, beginning in 1926, i.e., "The Chinook of 1926."

### Article VIII—Yell Leaders

Section 1: There shall be elected in the regular spring election of the Association a Yell King chosen from the Yell Dukes of the previous year. The Yell King may stand for re-election on an equal basis with the Yell Dukes. He shall have upperclass status and have at least a 2.00 grade average.

Section 2: Yell Dukes shall be selected from the Yell class in a competition conducted by the Board of Control following spring election. He shall have at least a 2.00 grade average.

Section 3: After registration for spring semester, the Yell King, with the help of the Yell Dukes, shall advertise a class in yell-leading tactics in which:

(1) all regularly enrolled students shall be eligible;

(2) the class shall meet at least twice a month at definitely stated times under the di-

rect supervision of the Yell King and the Yell Dukes;

(3) the curriculum shall consist of the study of definite yell-leading programs and of group psychology, the latter to come under the direction of a College instructor.

### Article IX—Awards

Section 1: All awards of the Association shall be governed by the "Code of Awards" of the Supplementary Code of Regulations, which shall be kept on file in the Office of the Association.

Section 2: The Code of Awards shall be subject to change at any regular meeting of the Board of Control. Any student may make recommendations to the Board of Control regarding changes in the Code of Awards.

### Article X—Student Managers

Section 1: An upperclass student manager shall be any student recommended by the General Manager and interested staff members, subject to the approval of the Board of Control, to perform the duties as prescribed by the General Manager in sports and other extracurricular activities excluding publications. All activities of these managers shall be governed by the Manager's Code. Appointments shall be for one school year.

Section 2: All student managers shall be under the direct supervision of the General Manager. All

athletic managers shall at all times work in close cooperation with the Director of Athletics and the coaching staff. Managers of other activities shall work in cooperation with the directors of those activities. The student managers shall each year prepare a report covering all events relating to their respective activity and submit these reports to the General Manager for permanent files.

## DEFENDANT'S EXHIBIT A-1

Student Book Corporation  
Balance Sheet and Operating Data, 1929 to 1949 Inclusive

Year Ended December 31	Total Assets	Current Assets	Accounts Receivable	Inventories	Fixed Assets	Current Liabilities	Net Worth	Sales	Net Profit Before Taxes	Net Profit After Taxes	Dividends Paid	Gross Profit	Enroll- ment (3)
(1) 1949.....	\$401,303.02	\$365,249.84	\$145,716.83	\$150,988.18	\$21,400.59	\$ 82,001.61	\$319,301.41	\$681,366.05	\$78,705.26	\$48,797.26	\$19,250.00	\$182,712.02	
1948.....	344,337.71	305,851.48	85,704.68	145,199.47	21,292.44	54,583.56	289,754.15	779,040.80	89,398.90	55,903.68	—0—	210,891.59	7,890
1947.....	417,899.10	380,411.68	167,265.77	200,509.18	22,312.20	184,048.63	233,850.47	741,373.68	73,601.11	46,014.45	—0—	203,513.38	7,279
1946.....	261,130.68	221,281.12	107,587.00	102,383.17	21,423.92	73,294.36	187,836.32	453,729.88	43,873.43	29,718.90	—0—	120,957.33	4,676
1945.....	175,090.44	95,807.10	16,482.74	50,566.54	16,944.96	16,951.38	156,139.06	220,797.36	22,566.42	16,876.45	46,200.00	63,502.99	2,430
1944.....	198,233.52	72,352.53	6,472.89	41,310.08	20,252.36	10,770.91	187,462.61	190,170.58	19,316.89	14,476.82	11,550.00	56,884.70	1,944
1943.....	215,722.26	95,774.73	5,248.21	40,594.50	23,422.44	31,186.47	184,535.79	272,605.46	36,325.56	17,479.62	7,700.00	77,637.50	4,126
1942.....	195,000.13	95,574.09	6,563.25	44,647.81	26,369.42	14,387.73	180,612.40	219,155.12	16,384.26	12,024.87	—0—	58,634.12	4,872
1941.....	169,686.15	70,458.72	7,974.25	41,386.57	30,147.82	8,383.39	161,302.76	203,628.00	13,009.91	10,359.63	9,240.00	52,682.21	5,081
1940.....	167,121.96	55,358.67	7,218.82	39,610.38	31,455.15	6,938.83	160,183.13	187,766.13	12,241.92	10,502.53	9,240.00	50,772.45	5,114
1939.....	165,319.96	50,042.89	5,919.65	40,293.45	32,160.31	6,399.36	158,920.60	178,718.83	12,477.36	10,953.68	—0—	48,944.78	4,884
1938.....	153,707.79	49,978.01	5,552.96	37,102.51	32,517.83	5,820.73	147,887.06	177,330.59	11,579.71	10,197.69	—0—	47,787.12	5,016
1937.....	142,432.67	44,818.19	4,109.42	34,805.73	35,122.76	4,629.10	137,808.57	177,498.61	12,490.52	11,286.02	7,700.00	47,839.33	4,701
1936.....	138,832.21	44,074.33	5,354.20	32,467.01	36,475.39	4,860.58	143,971.63	163,921.40	8,511.28	7,666.63	11,550.00	41,633.10	4,472
(2) 1935.....	153,538.53	44,507.01	3,486.65	30,348.88	39,926.78	4,153.15	139,385.38	150,682.75	10,446.72	9,020.47	—0—	41,801.60	4,230
(2) 1934.....	146,410.92	38,263.22	3,106.03	29,827.56	44,676.21	3,966.43	128,765.96	130,145.35	11,003.01	9,360.17	500.00	38,887.39	3,480
(2) 1933.....	132,186.90	42,374.34	2,109.40	29,454.34	45,020.93	3,315.46	128,871.44	103,256.68	5,331.68	4,598.57	442.10	31,127.14	4,021
(2) 1932.....	125,711.11	42,967.94	3,126.07	35,849.04	48,197.04	3,257.29	122,453.82	128,665.05	7,486.98	6,457.52	—0—	38,102.57	4,448
(2) 1931.....	120,445.89	35,556.95	2,733.76	32,100.99	51,982.77	3,979.05	116,466.84	165,590.20	10,972.16	10,015.50	—0—	48,069.46	4,170
(2) 1930.....	110,489.64	38,439.51	1,443.84	33,511.01	54,845.76	5,763.89	104,725.75	172,122.44	13,414.03	12,164.35	—0—	48,615.14	4,147
(2) 1929.....	93,332.96	36,528.99	1,572.79	32,671.02	43,223.24	2,105.17	91,227.79	152,260.05	10,345.00	9,337.05	—0—	40,356.48	3,488

Note: (1) Assets and liabilities are those at October 31, 1949; sales and other income data are for ten months ended October 31, 1949.

(2) Income taxes for the years 1929-1935 inclusive were paid in 1936. The amounts deducted in the years 1929-1935 inclusive are the amounts that were finally assessed by the Collector.

(3) Enrollment is that reported by the Registrar of the State College for the school year ended during the calendar year.





[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD  
ON APPEAL

I Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above-entitled cause all of the original pleadings and papers on file and of record in said cause in my office at Tacoma, Washington, to wit:

1. Complaint
2. Summons with Marshal's Return of Service
3. Stipulation Extending Time to Answer
4. Answer
5. Stipulation of Facts (with Exhibits 1-7, inclusive, attached)
6. Affidavit of Service (of proposed Findings of Fact and Conclusions of Law and Judgment)
7. Findings of Fact and Conclusions of Law
8. Judgment

9. Memorandum of Costs and Disbursements

10. Affidavit of Service of copy of Memo of Costs

11. Notice of Taxation of Costs

12. Notice (defendant) of Appeal

13. Order Extending Time to November 29, 1950, to File and Docket Record on Appeal

14. Reporter's Transcript of Proceedings (trial)

15. Designation of Defendant-Appellant of Contents of Record on Appeal

I do further certify that as part of the Record on Appeal I am also transmitting herewith the following enumerated exhibits, offered in evidence in the trial of the above-entitled cause, to wit:

(Attached to Stipulation of Facts)

Plaintiff's Exhibit No. 1: Articles of Incorporation, Student Book Corporation

No. 2: By-Laws of Student Book Corporation

No. 3: Letter from Commissioner of Internal Revenue

No. 4: Articles of Incorporation, ASSCW

No. 5: Constitution of ASSCW

No. 6: List of Expenditures

No. 7: Trust Agreement

No. 8: Newspaper clipping of Constitution

No. 9: Copy of Amendments

No. 10: Letter, Holland to Putnam

No. 11: Letter, Holland to Pettibone

No. 12: Booklet (pages 134-142)

and Defendant's Exhibit No. A-1: Balance sheet and operating data, Students Book Corp.,

and that the aforesaid original pleadings and exhibits constitute the Record on Appeal from the Judgment of the said District Court, filed on July 12, 1950, and entered in the civil docket of said cause on said date.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 25th day of November, 1950.

MILLARD P. THOMAS,  
Clerk.

[Seal] By /s/ E. E. REDMAYNE,  
Deputy.

[Endorsed]: No. 12756. United States Court of Appeals for the Ninth Circuit. Clark Squire, Collector of Internal Revenue, Appellant, vs. Students Book Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed November 27, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit  
No. 12756

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,

Appellant,

vs.

STUDENTS BOOK CORPORATION,

Appellee.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF RECORD FOR  
PRINTING

Now comes Clark Squire, Collector of Internal Revenue, appellant in the above-entitled case, and pursuant to subdivision 6, Rule 19 of the Rules of

the United States Court of Appeals for the Ninth Circuit, and states the points on which he intends to rely, as follows:

1. The District Court erred in making the following Finding of Fact:

XII.

The activities of the plaintiff have at all times been integrated and coordinated with those of the ASSCW and the State College and plaintiff is the alter ego of the ASSCW and at all times material hereto was organized and existed for the purpose of carrying out the objectives of the ASSCW which were incident and auxiliary to the educational purpose of the State College of Washington.

\* \* \*

2. The District Court erred in rendering the following Conclusions of Law:

I.

Plaintiff was during the years 1943 to 1947, inclusive, a corporation organized and operated exclusively for an educational purpose and no part of its net earnings inured to the benefit of any private individual or shareholder and no substantial part of its activities was in carrying on propaganda or otherwise attempting to influence legislation.

II.

During the years 1943 to 1947, inclusive, plaintiff was entitled to be exempt from corporate income tax, capital stock tax, excess profits tax, and corporate declared value excess profits tax.



## III.

Plaintiff is entitled to recover from the defendant taxes paid for the years 1943 to 1947, inclusive, in the sum of \$71,933.15 with interest thereon at the rate of 6% per annum as provided in the United States Code, Title 26, Section 3771 and plaintiff's costs and disbursements incurred herein.

With the foregoing statement, the appellant designates as necessary for the consideration of this appeal all that portion of the original papers of record in this cause heretofore transmitted by the Clerk of the District Court to the United States Court of Appeals for the Ninth Circuit material in consideration of this case, the contents of which transmitted portion are as follows:

1. Complaint.
2. Answer.
3. Stipulation of Facts (not including exhibits hereinafter included as plaintiff's Exhibits 1 to 7, inc.).
4. Findings of Fact.
5. Judgment.
6. Notice of Appeal.
7. Order Extending Time to file record.
8. Reporter's Transcript of Proceedings (trial).
9. Designation of Defendant-Appellant of Contents of Record on Appeal.
10. Plaintiff's Exhibits as follows:

No. 1. Articles of Incorporation, as amended.

No. 2. By-Laws.

No. 3. Letter from Com. of Int. Rev.

No. 4. Articles of Incorporation filed 7/10/28, Sec. State.

No. 5. Constitution of ASSCW.

No. 6. List of Expenditures by ASSCW.

No. 7. Trust Agreement.

No. 8. Newspaper Clipping of Constitution.

No. 9. Copy of Amendments.

No. 10. Letter, Holland to Putnam.

No. 11. Letter, Holland to Pettibone.

No. 12. Booklet (pages 134-142).

11. Defendant's Exhibit.

A.1. Balance Sheet and Operating Data, Students Book Corporation.

12. Appellant's Statement of Points and Designation of Record for Printing, with proof of service.

Dated this 29th day of November, 1950.

/s/ J. CHARLES DENNIS,  
United States Attorney.

/s/ GUY A. B. DOVELL,  
Assistant United States  
Attorney.

[Title of Court of Appeals and Cause.]

### AFFIDAVIT OF MAILING

Daisy Bryant, being first duly sworn, on oath deposes and says:

That she is a citizen of the United States, and a resident of Tacoma, Washington, an employee of the Justice Department, over the age of 21 years, and not a party to the above-entitled action.

That on the 29th day of November, 1950, she served a copy of the attached Appellants' Statement of Points and Designation of Record for Printing upon appellee's attorneys of record, Smith Troy, Attorney General of the State of Washington, and Lyle L. Iversen, Assistant Attorney General of said state, by mailing a true copy of said Statement and Designation properly enclosed in a sealed franked envelope not requiring postage, directed to Smith Troy, Attorney General, and Lyle L. Iversen, Assistant Attorney General, Temple of Justice, Capitol Grounds, Olympia, Washington, their official address, and deposited in the United States Post Office at Tacoma, Washington.

/s/ DAISY BRYANT.

Subscribed and Sworn to before me this 29th day of November, 1950.

[Seal]            /s/ G. A. B. DOVELL,  
Notary Public in and for the State of Washington,  
Residing at Tacoma.

[Endorsed]: Filed Dec. 1, 1950.

IN THE  
**United States**  
**Court of Appeals**  
FOR THE NINTH CIRCUIT

---

CLARK SQUIRE, Collector of  
Internal Revenue,

*Appellant*

vs.

STUDENTS BOOK CORPORATION,  
*Appellee*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

**BRIEF FOR THE APPELLANT**

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

ELLIS N. SLACK,

A. F. PRESCOTT,

GEORGE D. WEBSTER,  
*Special Assistants to  
the Attorney General*

J. CHARLES DENNIS,  
*United States Attorney.*

OFFICE AND POST OFFICE ADDRESS:  
1017 UNITED STATES COURT HOUSE  
SEATTLE, WASHINGTON



IN THE  
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CLARK SQUIRE, Collector of  
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## ARGUMENT:

The District Court erred in holding that the taxpayer is a corporation organized and operated exclusively for educational purposes within the meaning of Section 101(6) of the Internal Revenue Code. It is a corporation organized and operated for the purpose of carrying on a general mercantile business (bookstore and restaurant) and as such is not exempt from taxation.. 9

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IN THE  
**United States**  
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FOR THE NINTH CIRCUIT

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CLARK SQUIRE, Collector of  
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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
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---

**BRIEF FOR THE APPELLANT**

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**OPINION BELOW**

The findings of fact and conclusions of law of  
the District Court (R. 23-30) and its oral opinion  
(R. 76-81) are unreported.

**JURISDICTION**

This appeal involves federal income taxes. The  
taxes in dispute were paid on various dates between



March 15, 1944, and December 15, 1948. (R. 28.) The taxpayer filed claims for refund on March 13, 1947, for all federal taxes paid for the years 1943 through 1945, and these were rejected by notice dated September 27, 1948. (R. 29.) The claims for 1946 and 1947, dated June, 1948, have not been acted upon. (R. 29.) Within the time provided in Section 3772 of the Internal Revenue Code and on April 7, 1949 (R. 7), the taxpayer brought an action in the United States District Court for the Western District of Washington for recovery of taxes paid. (R. 3-7.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgment was entered on July 12, 1950. (R. 31-32.) Notice of appeal was filed August 31, 1950 (R. 32-33), pursuant to the provisions of 28 U.S.C., Section 1291.

### QUESTION PRESENTED

Whether a conventional business corporation, engaging in the operation of a competitive business for profit (book store and restaurant), is exempt from federal income tax under Section 101(6) and (14) of the Internal Revenue Code as being "organized and operated exclusively for an educational purpose.

### STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

## STATEMENT

The facts as found by the District Court (R. 24-29) and as stipulated by the parties (R. 11-23) may be summarized as follows:

Taxpayer, a Washington corporation, succeeded in 1923 to the Student Book Incorporated, a corporation organized in 1914 by the Associated Students of the State College of Washington, hereinafter referred to as the A.S.S.C.W., which supplied the original capital in the sum of \$2,000. (R. 11-12, 24-25.)

The taxpayer corporation for many years has operated a store on its own property adjoining the campus of the State College of Washington for the sale to students and faculty members at reasonable prices of textbooks, students' supplies and other items for the accommodation of students and faculty members. The management of the Students Book Corporation at all times works in coordination with the administration and faculty of the State College in determining items of textbooks and students' supplies to be carried in stock. In addition to its main store, taxpayer also has conducted a student restaurant on the campus of the State College in quarters furnished to taxpayer without charge by the college in a building designated the old gymnasium. Approximately

four per cent of taxpayer's business is done with persons not connected with the college. (R. 26.)

At all times since taxpayer's organization and until March 1, 1947, all of its stock was owned by A.S.S.C.W., a non-profit corporation organized under the laws of Washington and at all times subsequent to March 1, 1947, all of taxpayer's stock was held by the Board of Regents of the State College of Washington pursuant to a trust agreement between the Board of Regents and the A.S.S.C.W., whereby the principal and net earnings of the trust shall be used only in furtherance of the purposes for which the A.S.S.C.W. is organized. (R. 24-25.)

Dividends paid by taxpayer corporation were, from the time of its organization until March 30, 1929, paid to A.S.S.C.W. in the form of stock dividends, thereafter dividends were paid in cash to the A.S.S.C.W. Dividends paid in 1933 and 1934 were earmarked in the resolution by which they were declared for specific purposes; first, to finance a publication of the A.S.S.C.W. for distribution to students, and second, to finance the painting of President Emeritus E. A. Bryan, which was presented to the State College of Washington. With these exceptions the Board of Trustees of Students Book Corporation followed the dividend policy to make available funds

for the building of a student union building adjacent to or on the present campus of the State College of Washington. The Board of Trustees declared dividends at such times as the A.S.S.C.W. asked for money to implement the program for the construction of a student union building, which dividends were transferred to the bursar (now comptroller) of the State College, who in turn has disbursed these funds for the purchase of lands, title to which is held in the name of the State of Washington, and for other purposes connected with the construction of the student union building. Funds in excess of those needs are held in marketable securities. (R. 26-27.)

Taxpayer corporation has never passed a rebate to the students, faculty members or customers. The proposed student union building, when constructed, will be the property of the State of Washington. (R. 27.)

The taxpayer's charter authorized it to carry on a general book, stationery, sporting goods, refreshment and general mercantile business, to buy and sell real estate, and to engage in a general insurance business. (Ex. 1, R. 82-83.)

For the taxable years 1943 through 1947 the taxpayer paid to the Collector of Internal Revenue (appellant herein) corporate income, capital stock

and excess profits taxes aggregating \$71,933.15. (R. 28.)

The taxpayer filed claims for refund for all federal taxes paid for the taxable years 1943 through 1947. The claims for 1943 to 1945 were formally rejected. Those for 1946 and 1947 had not been acted upon when this proceeding was commenced but more than six months from the time of filing of the claims had expired. (R. 29.)

The taxpayer brought suit for refund, and, in rendering judgment for the taxpayer (R. 31-32), the District Court held that it was exempt under Section 101(6) of the Internal Revenue Code as the "alter ego" of the A.S.S.C.W. (R. 29, 79). The present appeal followed.

## STATEMENT OF POINT TO BE URGED

The District Court erred in holding that the taxpayer (book store and restaurant) is organized and operated exclusively for educational purposes within the meaning of Section 101(6) of the Internal Revenue Code.

## SUMMARY OF ARGUMENT

The District Court erroneously held that taxpayer, a corporation engaged exclusively in the busi-



ness of running a book store and operating a restaurant in competition with like commercial enterprises, is exempt from federal taxation. Its decision is clearly in conflict with the controlling statutory provisions, their legislative history, and long-standing Treasury Regulations and the applicable decisions.

In the first place, taxpayer is disqualified for exemption because its expressed purpose in the corporate charter and its activities do not reflect an educational purpose. Selling books, real estate and insurance — purposes set forth in the corporate charter — are certainly not directed toward an educational, exempting end. The activities of the taxpayer, involving the operating of a book store and restaurant, similarly do not look in the direction of an educational purpose. The fact that students and faculty were accommodated does not alter this conclusion. Neither does the fact that faculty members assisted in the control of taxpayer change the result, since they did so in an individual and not an official capacity. Any supervision by the college was based on a profit-wise association rather than on any legal rights to that supervision by the college authorities under the corporate charter and by-laws.

Code Section 101(6) exempts from tax a corporation which (1) is “organized and operated exclu-



sively for religious, charitable, scientific, literary, or educational purposes;" and (2) "no part of the net earnings of which inures to the benefit of any private shareholder or individual." Compliance with the second condition, as in the instant case, does not dispense with compliance with the first. The corporation, as distinguished from its shareholders, must be "organized and operated exclusively" for the specified purposes.

To hold that a conventional business corporation is itself exempt from tax because its stockholders are exempt would telescope into one the separate requirements of Section 101(6). It would fuse the separate taxable entities of a corporation and its stockholders (or stockholder) by ascribing to a corporation whose operations are purely commercial the educational functions of its stockholders. It would render superfluous the requirements of Section 101(14), which must be read in conjunction with Section 101(6). And it would attribute to Congress an intention to discriminate among competing business enterprises by granting tax immunity to those whose stockholders happen to be tax exempt. That this was the mistake of the District Court is emphasized by its erroneous finding that the taxpayer and the A.S.S.C.W. should be equated for tax purposes.

The applicable decisions of the Supreme Court and other courts likewise confirm the incorrectness of the decision below.

Nor is there anything in the legislative history of Section 101 which supports the trial court's interpretation of the statute. On the contrary, it is abundantly clear from the history and provisions of the Revenue Bill of 1950 and the accompanying committee reports, that Congress never intended to sanction the exemption of business corporations simply because their income is destined for exempt organizations.

## ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE TAXPAYER IS A CORPORATION ORGANIZED AND OPERATED EXCLUSIVELY FOR EDUCATIONAL PURPOSES WITHIN THE MEANING OF SECTION 101(6) OF THE INTERNAL REVENUE CODE. IT IS A CORPORATION ORGANIZED AND OPERATED FOR THE PURPOSE OF CARRYING ON A GENERAL MERCANTILE BUSINESS (BOOKSTORE AND RESTAURANT) AND AS SUCH IS NOT EXEMPT FROM TAXATION.

Presented on this review is a single question, arising, for the most part, from a stipulated set of facts: whether a conventional business corporation carrying on ordinary activities for profit in compe-

tion, or possible competition, with similar business enterprises is entitled to federal income tax exemption under Section 101(6) of the Internal Revenue Code, Appendix, *infra*.

The answer to the problem involved herein turns upon certain factual considerations and upon the legislative intent expressed in Code Section 101(6) and corollary Section 101(14), Appendix, *infra*.<sup>1</sup> The District Court held (R. 29-30, 79) that the taxpayer is immune from tax. We submit that its decision is not in accord with the controlling statutory provisions, their legislative history, the long-standing Treasury Regulations and rulings, and the applicable decisions of the Supreme Court and other courts.

A. *Taxpayer is disqualified for exemption because its expressed purpose and its activities do not reflect an educational purpose.*

The taxpayer's charter authorized it to carry on a general book, stationery, sporting goods, refreshment and general mercantile business, to buy and sell real estate, and to engage in a general insurance busi-

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<sup>1</sup> Any claim for exemption under Section 116(d) of the Internal Revenue Code, Appendix, *infra*, is similarly without merit. Taxpayer's income was not derived from any public utility or the exercise of any governmental function and accruing to any state, etc. See *Bear Gulch Water Co. v. Commissioner*, 116 F. (2d) 975 (C.A. 9th), certiorari denied, 314 U. S. 652; *Ohio v. Helvering*, 292 U. S. 360.

ness. (Ex. 1, R. 82-83; Ex. 2, R. 84.) During the taxable years, it operated a store on its own property adjoining the campus of the State College of Washington, in which it sold, mostly at retail prices, textbooks, students' supplies, candies, confections, guest supplies, and other items. (R. 18, 26.) Taxpayer also operated a restaurant which was located on its property until 1946, at which time the restaurant was moved to larger quarters on the campus furnished without charge by the college. (R. 26, 52.) The store and restaurant were open to the general public at the same prices, and taxpayer was in competition with other stores and restaurants. (R. 65.)

The State College of Washington did not own any interest in the taxpayer book store and restaurant, was not responsible for its debts and not entitled to any part of its earnings during the taxable periods involved herein. (R. 20.) All of taxpayer's stock was owned by the A.S.S.C.W., and the stockholders were appointed by the president of A.S.S.C.W., two of whom were members of the faculty of the college. (R. 24, 85-86.) The governing board of the taxpayer was composed of nine trustees who were elected by the stockholders. (R. 86.)

It is clear from the foregoing that the taxpayer is not entitled to the claimed exemption because its

expressed purpose and activities do not bring it within the statutory provision, i.e., that it be organized and operated exclusively for educational purposes. The declaration of purposes contained in taxpayer's charter of incorporation is clear and explicit and correctly reflects the nature of the activities which taxpayer carries on. The selling of books, real estate and insurance are not purposes which are directed to the end of the "improvement or development of the capabilities of the individual," which Treasury Regulations 111, Section 29.101(6)-1,<sup>2</sup> Appendix, *infra*, correctly states to be the object of education, but, rather, promote the successful function of the business system on a profitable basis. In fact, there is no provision whatever with respect to educational purposes. Whether or not a corporation is organized exclusively for charitable purposes so as to come within the exemption granted by Section 101(6) is determined, in part, by its charter. *Sun-Herald Corp. v. Duggan*, 73 F. (2d) 298 (C. A. 2d), certiorari denied, 294 U. S. 719; *Stanford University Book Store v. Helvering*, 83 F. (2d) 710 (C.A. D.C.); *Gagne v. Hanover Water Works Co.*, 92 F. (2d) 659 (C. A. 1st). As was pointed out

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<sup>2</sup> Section 29.101(6)-1 of Treasury Regulations 111, under the Code is derived from, and insofar as material here, is the same as Article 517 of Treasury Regulations 65, promulgated under the Revenue Act of 1924.



(p. 300) in the *Sun-Herald* case, in holding that a corporation which had sold its newspaper business and was still not capable, because of its charter, of taking advantage of the exemption provided in Section 101(14) of the Code:

Such a corporation is not exempt from income taxes, for it was not organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the same to an organization which is exempt from the tax. Indeed, there is legally nothing to prevent it from re-engaging in a newspaper publishing business as authorized by its charter.

And as further stated in the *Hanover Water Works* case (p. 661) in looking to the purpose as expressed in the charter:

It surely was not organized for the exclusive purpose of holding title to property and in fact did not limit its activities to such purposes.

Far from negating the stated purpose of the taxpayer as an organization, the activities which taxpayer carried on clearly serve the same end. The facts that the book store catered primarily to students and faculty (R. 18) and that it was judicious profit-wise to accept the supervision of the college, as did the book store in the *Stanford* case, *supra*, do not outweigh the object toward which the activities were directed — an ordinary commercial enterprise. The taxpayer's activities, as already outlined, con-



sisted of operating an ordinary mercantile business and running a restaurant. It cannot be seriously contended that, in the circumstances of this case, these are educational purposes. Even if it be assumed, *arguendo*, that the only purpose of taxpayer was (R. 26) "the accommodation of students and faculty members," this does not mean that others than students and faculty were not similarly accommodated. In fact, in the *Stanford* case, *supra* p. 711, this was the express purpose of the store, and yet it was held that this was not an educational purpose.

The theory of exemption for educational and charitable purposes has been stated to be in *Dwight School, &c. v. State Board of Tax Appeals*, 114 N.J.L. 594, 600:

Exemption can be justly sustained only on the principle that "the concession is due as a *quid pro quo* for the performance of a service essentially public, and which the state is relieved *pro tanto* from the necessity of performing, \* \* \*

Certainly, measured by this view, it clearly cannot be said that the taxpayer corporation was rendering a service essentially public.

Hence, on the basis of the expressed purpose and the activities of the taxpayer it was not organized and operated exclusively for educational purposes within the meaning of the statute.

B. *Taxpayer corporation is not exempt from federal income tax merely because its stockholder is organized and operated exclusively for educational purposes and is therefore exempt.*

1. Code Section 101(6) exempts from federal income tax a corporation which (1) is "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes;" and (2) "no part of the net earnings of which inures to the benefit of any private shareholder or individual."<sup>3</sup> The long-standing implementing Treasury Regulations (Section 29.101(6)-1 of Regulations 111) make it clear that these requirements constitute *separate* conditions precedent to exemption. They provide, among other things, that:

In order to be exempt under Section 101(6) the organization must meet three tests:

(1) It must be organized and operated exclusively for one or more of the specified purposes;

(2) Its net income must not inure in whole or in part to the benefit of private shareholders or individuals; and

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<sup>3</sup> A third statutory condition precedent to exemption, which taxpayer concededly satisfied and is not here involved, is that "no substantial part of \* \* \* [its] activities \* \* \* is carrying on propaganda, or otherwise attempting, to influence legislation."

Since taxpayer's net earnings inure to the benefits of a stockholder which is a tax exempt organization (R. 24-25), it unquestionably meets the second condition. But compliance with the second condition does not dispense with the necessity for compliance with the first. The corporation, as distinguished from its stockholders, must be "organized and operated" for the specified statutory purposes. A conventional business corporation organized to operate and actually operating a competitive commercial enterprise for profit does not qualify for tax exemption merely because its profits inure to the benefit of a tax exempt stockholder. To hold that a business corporation is itself exempt from tax because its stockholders are exempt would telescope into one the separate requirements of Section 101(6) that no part of the corporation's net income inure to a private shareholder, *and* that the corporation be organized and operated exclusively for the purposes specified in the statute.

The statute is concerned with where the money comes from (activity) rather than where it goes. To hold otherwise, as did the lower court,<sup>4</sup> would be to

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<sup>4</sup> That this was the basic mistake of the lower court seems clear from its finding of fact which, in effect, ignored the corporate structure of the taxpayer and equated for tax purposes the taxpayer, A.S.S.C.W., and the State College of Washington. (R. 29.)

erase from the statute the explicit requirement that the corporation be "operated" exclusively for "educational" or like purposes. Indeed, under the District Court's interpretation, even a corporation whose profits are derived from illegal business activities (e.g., gambling, narcotics) would be exempt from tax as a "religious" or "charitable" or "educational" organization if its stockholders happen to be religious or charitable or educational institutions. It is inconceivable that Congress so intended, and nothing in Section 101(6) lends any support to such view. See *C. F. Mueller Co. v. Commissioner*, 14 T. C. 922 (now on taxpayer's petition for review to the United States Court of Appeals for the Third Circuit).

2. In subdivision (14) of Section 101<sup>5</sup> Congress addressed itself to situations in which a corporation, which does not qualify for exemption under subdivision (6) or one of the other subdivisions of that section, dedicates its income to another organization which does qualify. It exempts from tax:

Corporations organized for the exclusive purposes of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this chapter;

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<sup>5</sup> Code Section 101(14) is derived from and is substantially the same as Section 11(a) Twelfth of the Revenue Act of 1916, c. 463, 39 Stat. 756.

Thus Congress was fully aware of the possibility that the earnings of a corporation which did not itself meet the exemption tests might be distributable to a tax exempt parent corporation, such as a university, a student organization, a labor union, a social club, etc. Yet it saw fit to limit the exemption in such cases to situations where the subsidiary corporation's only function is that of "holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses," to the exempt parent. When subdivision (14) is read together with the other subdivisions of Section 101, as it must be (*Helvering v. Stockholms &c. Bank*, 293 U. S. 84, 93-94; *United States v. Amer. Trucking Ass'ns*, 310 U. S. 534, 543-544), it is manifest that Congress intended to accord tax exempt status to a corporation on the basis of its own purposes and activities, not those of its parent-stockholder, except in one type of situation, namely, where the subsidiary serves merely as a holding and collecting agency for an exempt parent.

Had Congress intended to exempt any corporation—regardless of the nature of its activities—solely by virtue of the fact that its earnings are distributable to a tax exempt parent, it could readily and simply have said so. Instead, in subdivision (14) it



carefully circumscribed the subsidiary's right to exemption by providing that its activities must be confined to holding title to property. If, for example, taxpayer's stockholder were a labor organization which is exempt under subdivision (1) of Section 101 (rather than a student organization exempt under subdivision (6)), it certainly could not be maintained that taxpayer (a student book store and restaurant) is a labor organization merely because its stockholder is one. That its stockholder is tax exempt does not of course satisfy one of the several conditions precedent to exemption contained in subdivision (14). But the additional requirements of that subdivision must also be satisfied. *Bear Gulch Water Co. v. Commissioner*, 116 F. (2d) 975 (C. A. 9th), certiorari denied, 314 U. S. 652.

Unless the requirements of subdivision (14) are to be discarded as sheer surplusage, the conclusion is irresistible that ordinary business corporations like taxpayer are not entitled to exemption under subdivision (6) merely because their earnings inure to the benefit of an exempt parent corporation. As Judge Learned Hand stated in his dissenting opinion in *Roche's Beach, Inc. v. Commissioner*, 96 F. (2d) 776 (C. A. 2d):

It is possible that, if subdivision 14 had not been added to Section 103, 26 U.S.C.A. § 103



(14) and note, we ought to have read subdivision (6), 26 U.S.C.A. § 103(6) note, to comprise companies all of whose profits go to one of the purposes therein described, although *Trinidad v. Sagrada Orden*, 263 U. S. 578, 44 S. Ct. 204, 68 L. Ed., 458, gives no color to such an interpretation; rather the reverse, for the business income of the taxpayer was there very trifling. It might nevertheless have been possible to say that as subdivision 6 defined exemption by function, and the other subdivisions by the common names of the corporations, a difference of intent was manifest, though I should not have thought so, because the description by function related, I think, to the corporate activities. But subdivision 14 precludes any such reading. Obviously, as to all other subdivisions it meant that a subsidiary should not be exempted merely because its parent was exempt; that was indeed one condition, but the subsidiary must also confine its activities to the mere receipt of income. We are now holding that the subsidiary of a company exempt under subdivision 6 need not fulfill this second condition, but is *ex proprio vigore* as much within subdivision 6 as its parent. It might be desirable to prefer corporations within subdivision 6 in that way, but I cannot find any warrant for doing so. The purpose of subdivision 14 was to tax all business income, however destined, unless the company was really not in business at all. To some extent it is indeed true that that purpose can be evaded; an exempt corporation may go into business not strictly germane to its charter powers without losing its exemption. But there are several checks upon this possibility; first, the business must be small, if the corporation is to retain its classification under its appropriate subdivision; second, in many cases it will wince at exposing its funds to the hazards of business; third, its

charter will often forbid such excursions. But I believe that when, however actuated, an exempt parent does resort to a business subsidiary, any income so obtained becomes taxable. For these reasons I think that the Board was right.

Significantly, no claim is (R. 38) or can be made here that taxpayer qualifies for exemption under Section 101(14).

That Congress did not intend to exempt a business corporation from tax merely because its net income is distributable to a tax exempt organization is also confirmed by Code Section 23(q)(2), which limits allowable deductions by a corporation on account of contributions to organizations described in Section 101(6) to an amount not exceeding 5 per cent of its net income. This section too would become meaningless if, as taxpayer argues, the entire net income of a business corporation escapes tax merely because the income is destined for a tax exempt organization.

3. It is axiomatic that a corporation and its stockholders are separate and distinct taxable entities. *Moline Properties v. Commissioner*, 319 U. S. 436; *National Carbide Corp. v. Commissioner*, 336 U. S. 422; *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 415. To hold that a purely commercial corporation in competition with others is exempt from tax

on its net income because its stockholders are exempt from tax on their net income does violence to the basic principle. Had taxpayer's stockholder itself conducted taxpayer's book store and restaurant, it would not have been entitled to tax exemption even though it also carried on educational activities. Such activities would "amount to engaging in trade" and consist of "selling to the public in competition with others." *Trinidad v. Sagrada Orden*, 263 U. S. 578, 582. See also *Better Business Bureau v. United States*, 326 U. S. 279; *Underwriters' Laboratories v. Commissioner*, 135 F. (2d) 371 (C. A. 7th), certiorari denied, 320 U. S. 756; Sec. 29.101(6)-1 of Treasury Regulations 111.<sup>6</sup> It follows then clearly that taxpayer corporation which performed no educational functions is not exempt. *Bear Gulch Water Co. v. Commissioner*, 116 F (2d) 975 (C. A. 9th), certiorari denied, 314 U. S. 652; *Gagne v. Hanover Water Works Co.*, 92 F. (2d) 659 (C. A. 1st).

Any other construction of Section 101 (6) than that urged by the Collector ascribes the purposes and functions of a corporation's stockholder to the corporation itself and, as a consequence, treats a con-

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<sup>6</sup> Section 29.101(6)-1 of Treasury Regulation 111 provides that a corporation which has exempt purposes and "which also manufactures and sells articles to the public for profit" is not exempt.

ventional business corporation as though it were an educational institution. It is one thing to exempt from tax dividends received by a tax exempt institution from a business corporation. It is quite another thing to exempt the corporation's profits from tax. The tax status of the stockholder is no more determinative *per se* of that of the corporation than, conversely, the tax status of the corporation is determinative of that of the stockholder. They are separate entities for tax no less than for other purposes.

At this juncture, it should be noted that the lower court's finding (R. 29, 79) that the taxpayer was the *alter ego* of the A.S.S.C.W. doubly emphasizes the fact it was making this fundamental mistake. Its finding in this connection is "clearly erroneous." See *United States v. Gypsum Co.*, 333 U. S. 364, 394, rehearing denied, 333 U. S. 869. Taxpayer was no more the *alter ego* of its stockholder than any corporation is the *alter ego* of its stockholder or stockholders in the sense that they can dictate the policies and activities of the organization within the framework of the charter powers and purposes. But taxpayer had a separate corporate existence which should not be ignored. This same theory of equating a book store and an exempt institution which it served was advanced in *Stanford University Book*

*Store v. Helvering, supra*, and rejected by the court (p. 712):

It must be remembered that the association is not, in contemplation of law, a division or part of the university. The university as such does not own any interest in the association, is not responsible for its debts, is not entitled to any part of its earnings, and takes no part in conducting and managing its affairs. The two institutions are separate legal entities and therefore the attributes of the university cannot be attributed to the association, nor can the latter claim to be an educational institution because the university is such. The members of the faculty of the university, as such, were not charged with the duty of conducting the affairs of the association.

Thus, the book store in the instant proceeding, as in the *Stanford* case, was not an integral part of the exempt organization which it served. In the *Stanford* case, the members of the university faculty were the officers and directors of the book store, but they were employed in an individual and not a collegiate capacity. In this case, it is also clear that any faculty member who served, did so in an individual and not a representative capacity. Similarly, cooperation with the faculty on the part of the taxpayer in the stocking of adopted books (R. 19), or in the stockholder-corporate relationship with A.S.S.C.W., does not make the taxpayer a division or part of the college or the *alter ego* of A.S.S.C.W.



4. The construction which the District Court puts upon Section 101 (6) (equating a corporation with its tax exempt stockholder) results in harsh discrimination between corporations engaged in profit-seeking business activities whose stockholders are tax exempt and those engaged in similar activities but whose stockholders are not exempt. It affords the former a tremendous competitive advantage over the latter, since businesses whose profits are tax exempt are obviously in a position to undersell those whose profits are subject to diminution by the tax. "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse." *Colgate Co. v. United States*, 320 U. S. 422, 425.

Nothing in Section 101 or elsewhere warrants the assumption that Congress meant to grant tax immunity to a corporation engaged in ordinary commercial activity for profit — and thereby foster economic inequality among competing business enterprises — solely because the net income of its stockholder is exempt from tax. Nor is there any basis for imputing to Congress a desire to increase the tax burden of other taxpayers, by exonerating ordinary business corporations from tax on their profits, merely because their stockholders are granted exemption from tax on dividends received from the corporation. Quite apart from the explicit requirement in



Section 101 (6) that the corporation be operated exclusively for religious and charitable purposes, it is clear from corollary Section 101 (14) that Congress intended to exempt a corporation on the basis of its stockholders' right to exemption only where the corporation's activities are confined to "holding title" to income producing property.

5. The decision below is in conflict not only with the controlling statutory provisions and the implementing Treasury Regulations but with the applicable decisions of the Supreme Court and other courts. *Better Business Bureau v. United States*, 326 U. S. 279; *Trinidad v. Sagrada Orden*, 263 U. S. 578, 582; *Universal Oil Products Co. v. Campbell*, 181 F. (2d) 451 (C. A. 7th), certiorari denied, 340 U. S. 850, rehearing denied, 340 U. S. 894; *Bear Gulch Water Co. v. Commissioner*, 116 F. (2d) 975 (C. A. 9th), certiorari denied, 314 U. S. 652; *Underwriters' Laboratories v. Commissioner*, 135 F. (2d) 371 (C. A. 7th), certiorari denied, 320 U. S. 756; cf. *Allen v. Regents*, 304 U. S. 439; *Davenport Foundation v. Commissioner*, 170 F. (2d) 70 (C. A. 9th); *Smyth v. California State Automobile Ass'n*, 175 F. (2d) 752 (C. A. 9th), certiorari denied, 338 U. S. 905.

In the *Better Business Bureau* case, *supra*, a corporation claimed exemption from social security

tax as an "educational" organization, under a section of the Social Security Act which contains the same language as Code Section 101 (6) here involved.<sup>7</sup> It was stipulated there that no part of the earnings inured to any private shareholder. In holding that the corporation was not entitled to exemption, the Court stated (p. 283):

It has been urged that a liberal construction should be applied to this exemption from taxation under the Social Security Act in favor of religious, charitable and educational institutions. Cf. *Trinidad v. Sagrada Orden*, 263 U. S. 578; *Helvering v. Bliss*, 293 U. S. 144. But it is unnecessary to decide that issue here. Cf. *Hassett v. Associated Hospital Service Corp.*, 125 F. (2d) 611 (C. C. A. 1). Even the most liberal of constructions does not mean that statutory words and phrases are to be given unusual or tortured meanings unjustified by legislative intent or that express limitations on such an exemption are to be ignored. Petitioner's contention, however, demands precisely that type of statutory treatment. Hence it cannot prevail.

In denying the exemption to the book store connected with Stanford University, the Court (*Stanford*

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<sup>7</sup> While the Supreme Court was there dealing with exemption from Social Security tax, its decision is highly persuasive here. The Court pointed out (p. 284) that the provision of the Social Security Act under construction "was drawn almost verbatim from Section 101 (6) of the Internal Revenue Code." It also relied upon the Treasury Regulations addressed to Code Section 101 (6).

*University Book Store v. Helvering, supra*) stated (p. 712):

The association itself did not take part in the instruction of students of the university. It employed no teachers and offered no courses of study. The mere business of selling books or other "general merchandise" on a college campus does not connote an "educational purpose." The university itself was the sole institution which engaged in the instruction and education of its students and it alone would be entitled to the exemption permitted by the statute.

The distinction made by the trial court (R. 80-81) in its oral opinion between the instant case and the *Stanford* case is not convincing. It is true that the earnings and profits of the Stanford book store did inure to the benefits of private individuals. But neither that book store nor the one involved herein met the first requirement of the statute, i.e., that it be organized and operated for educational purposes.<sup>8</sup>

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<sup>8</sup> The other book store case involved Montana State University. *Assoc. Students' Store v. Commissioner*, decided March 5, 1942 (1942 P-H B. T. A. Memorandum Decisions, par. 42, 132). There, a corporation, operating a book store and lunch room in connection with the University, contended that it was so closely integrated and coordinated with the school that it should be tax exempt. In rejecting this argument, the Board stated:

Such control as the University exercised over petitioner was supervisory in character. Such supervision was permissive rather than based on

The decision in *Roche's Beach, Inc. v. Commissioner*, 96 F. (2d) 776 (C. A. 2d),<sup>9</sup> stems from a

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any legal rights. *Situated on the campus and depending, as it did, on the students and faculty of the University for its business success, the bookstore had to operate in a manner approved by the University authorities.* Petitioner asserts that the control of the State and the University over its funds and affairs is demonstrated by the pledging of its investment income by the State Board of Education. This assumption of authority was never contested by the petitioner, possibly because it was to petitioner's own advantage to secure the new quarters in the Student Union Building. (Emphasis supplied.)

The Board came to this conclusion despite the fact that the articles of incorporation specified the object of the corporation to be the fostering of the educational interests of the students (as contrasted with the commercial motives expressed in taxpayer's articles of incorporation), that the manager of the book store was appointed by the board of directors and the president of the University and the student auditor exercised general supervisory powers over its financial affairs and accounts. See also I. T. 2636, XI-2 Cum. Bull. 102 (1932); G. C. M. 159, V-2 Cum. Bull. 67 (1926).

<sup>9</sup> The *Roche's Beach* case involved subparagraphs (6) and (14) of Section 103 of the Revenue Act of 1928, c. 852, 45 Stat. 791, the relevant portions of which are identical with subparagraphs (6) and (14) of Code Section 101. The Tax Court there denied the exemption on the narrow ground that the purposes for which a corporation is organized and operated must be found exclusively in its charter. The Court of Appeals rejected this view and proceeded (p. 778) to discuss a question which "has not been argued by the parties."

misconception of the Supreme Court's holding in *Trinidad v. Sagrada Orden*, 263 U. S. 578. In the *Sagrada Orden* case, a religious organization that was otherwise tax exempt undertook as a minor part of its activities to sell wine and chocolate to its member churches, from which activities it received a trivial amount of income. The Government took the position that these activities deprived the organization of its tax exempt status, because it was not "operated exclusively" for religious purposes. In holding that the organization did not lose its exemption, the Supreme Court in its opinion (p. 581) used language suggesting that the exemption depended not upon the "source of the income", but rather upon its "destination." However, the Court noted (p. 581) that such limited trading, if it can be called such, is purely incidental to the pursuit of those [religious] purposes, and is in no sense a distinct or external venture. The crux of its opinion is to be found in the following language (p. 582):

As respects the transactions in wine, chocolate and other articles, we think they *do not amount to engaging in trade in any proper sense of the term. It is not claimed that there is any selling to the public or in competition with others.* The articles are merely bought and supplied for use within the plaintiff's own organization and agencies — some of them for strictly religious use, and the others for uses which are purely in-



cidental to the work which the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. *Financial gain is not the end to which they are directed.* (Emphasis supplied.)

The plain implication of the Supreme Court's decision in the *Sagrada Orden* case (and its later decision in the *Better Business Bureau* case, *supra*) is that a corporation "selling to the public or in competition with others" for "financial gain" is not within the exempt class, even though it also performs tax exempt activities. In harmony with the principles enunciated in that case, the Treasury Regulations have since 1924 provided that an organization which has exempt purposes "and which also manufactures and sells articles to the public for profit, is not exempt." Art. 517 of Treasury Regulations 65 under the Revenue Act of 1924; Sec. 29.101(6)-1 of Treasury Regulations 111 under the Code. Since a corporation which engages in *both* tax exempt and profit-seeking commercial activities is not entitled to exemption, clearly one which carries on *only* commercial activities for profit is not. If the A.S.S.C.W. stockholder here carried on taxpayer's book store and restaurant business in addition to its educational activities, under the reasoning in the *Sagrada Orden* case it would be subject to tax on its business income. Taxpayer, which carries on no educational activities



whatever but which is only a mercantile establishment, stands in no better position. In short the very reasons which impelled the Supreme Court in the *Sagrada Orden* case to hold that the religious organization there involved was exempt compels the opposite conclusion in this kind of a case.

Nevertheless, in view of the language in the *Sagrada Orden* opinion that the "destination" rather than the "source" of the income is the test, a widespread practice has arisen in recent years whereby ordinary business corporations have sought exemption, not because their activities were charitable or educational but because of the "destination" of the income, their stock being owned by a charitable or educational institution. The majority opinion in the *Roche's Beach* case lent impetus to this practice by construing the *Sagrada Orden* decision as holding that the "destination" of a corporation's income is the exclusive test of its right to exemption. But, as Judge Learned Hand observed in his dissenting opinion in that case (p. 779), the *Sagrada Orden* case "gives no color to such an interpretation; rather the reverse."

Thus, for the cogent reasons pointed out in this dissenting opinion in the *Roche's Beach* case, that case was incorrectly decided and should not be fol-

lowed by this Court. That Congress had not endorsed the interpretation placed upon Section 101 (6) and (14) in the *Roche's Beach* case is apparent from Sections 301 (b) and 302 of the Revenue Bill of 1950 (H. R. 8920, 81st Cong. 2d Sess.) and the committee reports accompanying that bill.

Neither has the Treasury Department subscribed to the interpretation placed upon the statute in the *Roche's Beach* case. Since 1924 the Treasury Regulations have provided that to qualify for exemption a corporation must be "organized and operated exclusively for one or more of the specified purposes", and that one "which also manufactures and sells articles to the public for profit, is not exempt." Art. 517 of Treasury Regulations 65 under the Revenue Act of 1924; Sec. 29.101(6)-1 of Treasury Regulations 111 under the Code. The Regulations cannot be said to be plainly inconsistent with the statute, and hence they must be "deemed to possess implied legislative approval and to have the effect of law" by virtue of reenactments of the statute. *Commissioner v. Flowers*, 326 U. S. 465, 469; *Boehm v. Commissioner*, 326 U. S. 287, rehearing denied, 326 U. S. 811; *Helvering v. Winmill*, 305 U. S. 79. Since the Regulations preclude exemption of corporations which carry on both exempt and business activities, they

manifestly also preclude exemption of those which carry on only business activities.

Admittedly, the decision in *Roche's Beach*, although contrary to the statute and the Regulations, was at first accepted by the General Counsel of the Bureau of Internal Revenue as a precedent in other cases involving substantially the same facts. G. C. M. 20853, 1938-2 Cum. Bull. 166; G. C. M. 21610, 1939-2 Cum. Bull. 103; G. C. M. 22116, 1940-2 Cum. Bull. 100. But these rulings were later revoked, and since 1942 the Commissioner has expressly refused to follow the *Roche's Beach* decision. G. C. M. 23063, 1942-1 Cum. Bull. 103. Certainly the Commissioner was not obliged to perpetuate rulings of his General Counsel which were inconsistent with both the statute and Regulations. The doctrine of legislative approval of the Treasury's interpretation by reenactment of the statute does not apply to departmental rulings which (unlike Treasury Regulations) are not promulgated by the Secretary. *Biddle v. Commissioner*, 302 U. S. 573, 582; *Helvering v. N. Y. Trust Co.*, 292 U. S. 455; *Higgins v. Commissioner*, 312 U. S. 212, 215-216.

Even if the Commissioner had not revoked his acquiescence in the *Roche's Beach* decision back in 1942 (G. C. M. 23063, *supra*), but were attempting

to do so now for the first time, that would not operate as a bar to a correct construction of the statute either by the Commissioner or this Court. *Smyth v. California State Automobile Ass'n*, 175 F. (2d) 752 (C. A. 9th), certiorari denied, 338 U. S. 905; *Keystone Automobile Club v. Commissioner*, 181 F. (2d) 402 (C. A. 3d).

6. Nothing in the legislative history of Section 101 (6) and (14) supports the conclusion reached by the trial court. The provisions now contained in Code Section 101 (6), in so far as here relevant, first appeared in Section II G(a) of the Income Tax Act of 1913, c. 16, 38 Stat. 114; while those contained in Code Section 101 (14) first appeared in Section 11 (a) Twelfth, Revenue Act of 1916, c. 463, 39 Stat. 756. The committee reports which accompanied those Acts shed no light one way or another on the question here presented.

The first attempt by Congress to clarify the provisions of Section 101 (6) and (14) is to be found in the Revenue Bill of 1950, H. R. 8920, 81st Cong., 2d Sess. It is abundantly clear from the background and provisions of that Bill, as well as the accompanying committee reports, that Congress never intended to sanction the tax exemption of business corporations, like the one in the instant case, merely because

their earnings are destined to tax exempt organizations.

In view of the above we submit that the District Court was in error in holding that the taxpayer is a corporation organized and operated exclusively for educational purposes. It carried on an ordinary mercantile business and therefore should not be immune from federal income taxation.

### CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

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## APPENDIX

## Internal Revenue Code:

## SEC. 101. EXEMPTIONS FROM TAX ON CORPORATIONS.

The following organizations shall be exempt from taxation under this chapter:

\* \* \*

(6) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

\* \* \*

(14) Corporations organized for the exclusive purposes of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt from the tax imposed by this chapter;

\* \* \*

(26 U. S. C. 1946 ed., Sec. 101.)

SEC. 116. EXCLUSIONS FROM GROSS INCOME [As amended by Section 2, Public Salary Tax Act of 1939; Sections 148, 149, 1942 Act; Sections 107(b), 125(a), 1943 Act].

In addition to the items specified in Section



22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

\* \* \*

(d) *Income of States, Municipalities, Etc.* — Income derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, or income accruing to the government of any possession of the United States, or any political subdivision thereof.

\* \* \*

(26 U. S. C. 1946 ed., Sec. 116.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.101(6)-1. *Religious, Charitable, Scientific, Literary, and Educational Organizations and Community Chests* — In order to be exempt under Section 101 (6) the organization must meet three tests:

(1) It must be organized and operated exclusively for one or more of the specified purposes;

(2) Its net income must not inure in whole or in part to the benefit of private shareholders or individuals; and

(3) It must not by any substantial part of its activities attempt to influence legislation by propaganda or otherwise.

Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that a corporation established for the

relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily deprive it of exemption.

An educational organization within the meaning of the Internal Revenue Code is one designed primarily for the improvement or development of the capabilities of the individual, but, under exceptional circumstances, may include an association whose sole purpose is the instruction of the public, or an association whose primary purpose is to give lectures on subjects useful to the individual and beneficial to the community even though an association of either class has incidental amusement features. An organization formed, or availed of, to disseminate controversial or partisan propaganda is not an educational organization within the meaning of the Code. However, the publication of books or the giving of lectures advocating a cause of a controversial nature shall not of itself be sufficient to deny an organization the exemption, if carrying on propaganda, or otherwise attempting, to influence legislation forms no substantial part of its activities, its principal purpose and substantially all of its activities being clearly of a nonpartisan, noncontroversial, and educational nature.

Since a corporation to be exempt under Section 101 (6) must be organized and operated exclusively for one or more of the specified purposes, an organization which has certain religious purposes and which also manufactures and sells articles to the public for profit, it not exempt under Section 101 (6) even though its property is held in common and its profits do not inure to the benefit of individual members of the organization. See Section 101 (18) as to religious or apostolic associations or corporations.

A corporation otherwise exempt under Section 101 (6) does not lose its status as an exempt corporation by receiving income such as rent dividends, and interest from investments, provided such income is devoted exclusively to one or more of the purposes specified in that section.

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In the  
United States  
Court of Appeals  
For the Ninth Circuit

---

CLARK SQUIRE, Collector of Internal  
Revenue,

*Appellant,*

v.

STUDENTS BOOK CORPORATION,

*Appellee.*

} No. 12756.

---

UPON APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE WESTERN DIS-  
TRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, JUDGE

---

BRIEF OF APPELLEE

---

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UPON APPEAL FROM THE DISTRICT COURT OF  
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---

**BRIEF OF APPELLEE**

---

Appellee concurs in the statements contained in ap-  
pellant's brief relative to "Opinion below" and "jurisdic-  
tion".

I. QUESTION PRESENTED

Appellee submits that a more fair statement of the  
question presented is as follows:

Whether a business corporation fully owned by an  
exempt educational institution and carrying on the busi-  
ness of a college book store and campus restaurant, whose  
earnings are entirely devoted to the purposes of the ex-

empt owners of its stock, is exempt from federal income tax, under Sec. 101(6), of the Internal Revenue Code as being organized and operated exclusively for an educational purpose.

The lower court answered this question in the affirmative.

## II. STATUTES INVOLVED

Appellee concurs with the statement contained in the brief of the appellant, relative to statutes and regulations involved.

## III. STATEMENT OF THE CASE

Appellee concurs in the statement of the case, which appears in the brief of appellant, except to add the following:

By-Laws of Students Book Corporation, Article V, section 3 C, as amended September 21, 1933, require that all actions of the Board of Trustees be submitted to the President of the college for approval (R. 87-88, 57). Likewise, all actions of the governing body of the parent organization, A.S.S.C.W., are subject to the control of the President of the college and the Board of Regents, by the terms of Sec. 3, Article II, A.S.S.C.W. Constitution (R. 102). The comptroller of the college holds the fidelity bonds of the officers of the Students Book Corporation (R. 57-58) and the comptroller of the college, ex-officio, acts as treasurer of the book store. (Plaintiff's exhibits 10 and 11, R. 133, 136; R. 42.) The book store is located on land which was originally at the edge of the campus, but which is now completely surrounded by the college campus (R. 64).

#### IV. SUMMARY OF ARGUMENT

The Students Book Corporation is organized and operated solely for the purpose of furthering the educational functions of the State College of Washington. While in form it is a business corporation, actually its affairs are controlled by a board made up of representatives of the A.S.S.C.W., an exempt corporation, having an educational purpose, and representatives of the college Board of Regents. Its profits have been, and will continue to be used, exclusively for the benefit of the college. The president of the college has a veto over all actions of the governing board of the Students Book Corporation, and in every sense, it is organized and operated exclusively for an educational purpose. No part of its net earnings ever have, nor can in the future, inure to the benefit of any private individual or shareholder. It, therefore, meets the requirements for exemption under section 101 (6) of the Internal Revenue Code, and is entitled to exemption.

#### V. ARGUMENT OF APPELLEE

##### 1. Exemption is Determined by the Destination of the Income

The Supreme Court of the United States, long ago, recognized that the exemption provided for from federal corporate income taxes, is applicable, notwithstanding that profits may be earned from commercial enterprises, if the destination of the profits is the support of a charity. In the case of *Trinidad v. Sagrada Orden De Predicadores*, 263 U. S. 578, 68 L. Ed. 458, the Supreme Court held that a corporation organized for religious and charitable purposes was exempt from income tax al-



though it earned profits from rents, dividends, interest, and the sale of wine and chocolate.

The court there said:

"The defendant concedes that the plaintiff is organized and operated for religious, charitable and educational purposes and that no part of its net income inures to the benefit of any stockholder or individual, but contends that it is not 'operated exclusively' for those purposes, and therefore is not within the exception in the taxing act. Stated in another way, the contention is that the plaintiff is operated also for business and commercial purposes in that it uses its properties to produce income, and trades in wine, chocolate and other articles. In effect, the contention puts aside as immaterial the fact that the income from the properties is devoted exclusively to religious, charitable and educational purposes, and also the fact that the limited trading, if it can be called such, is purely incidental to the pursuit of those purposes, and is in no sense a distinct or external venture.

"Whether the contention is well taken turns primarily on the meaning of the excepting clause, before quoted from the taxing act. Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, and yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption."

The decision of the U. S. Supreme Court, above quoted, has settled any question as to whether an exempt corporation may be operated exclusively for an exempt purpose notwithstanding that it earns income to be used for such purpose by a commercial operation. It should be noted that the decision of the U. S. Supreme Court occurred in 1924, and has been followed by numerous decisions of the lower federal courts, which will be cited hereafter in this brief.

Nevertheless, congress has not seen fit to change the wording of the exemption, although the Internal Revenue Code has been adopted subsequent to that time and numerous amendments have occurred in the tax laws. This is a direct holding that it is not the source of the income, but the destination, that is the ultimate test of exemption.

That decision settles the question that a corporation may be exempt notwithstanding that it earns income from a commercial venture.

Directly contrary to the reasoning of appellant and the Commissioner of Internal Revenue is the decision of the Second Circuit Court of Appeals, in the case of *Roche's Beach Inc. v. Commissioner of Internal Revenue*, 96 F. (2d) 776. In that case, Roche's Beach, Inc., was engaged in the commercial operation of a public bathing beach. All of its stock was bequeathed to testamentary trustees for the purpose of establishing a fund for the relief of destitute women and children, which was conceded to be a charitable purpose. The court held that notwithstanding that Roche's Beach, Inc., was a business corporation and carried on a commercial activity it was entitled to exemption under sub-section 6 of section 101 of the Internal Revenue Code (formerly designated section 103). In so holding, the court said:

"To gain exemption under subdivision 6 of section 103, 26 U. S. C. A. § 103 (6) note, the petitioner must be a corporation 'organized and operated exclusively for \* \* \* charitable \* \* \* purposes \* \* \* no part of the net earnings of which inures to the benefit of any private shareholder or individual.' This does not mean that to come within the exemption a corporation may not conduct business activities for profit. The destination of the income is more significant than its source. See *Trinidad*

*v. Sagrada Orden*, 263 U. S. 578, 44 S. Ct. 204, 68 L. Ed. 458; *Sand Springs Home v. Commissioner*, 6 B. T. A. 198, 214; *Appeal of Unity School of Christianity*, 4 B. T. A. 61 \* \* \*.

"In our opinion the petitioner is entitled to exemption under section 103 (6) unless it must be held that this subdivision applies only to a corporation which directly dispenses charity and excludes one which merely produces income for a charity administered by another tax exempt organization. This precise question has not been argued by the parties, but it is necessarily suggested by the contrast between subdivisions 6 and 14 and must be determined to decide the meaning to be ascribed to the phrase 'organized and operated exclusively for charitable purposes.' Since subdivision 14 relates to corporations which feed a tax exempt organization, the implication might arise that no 'feeding' corporation except those there described was intended to be granted exemption. If so, then subdivision 6 must be confined to corporations which themselves perform religious, charitable, scientific, literary, or educational functions. But we do not think the implication should be pressed so far. Exemptions of income devoted to charity are begotten from motives of public policy and are not to be narrowly construed. *Helvering v. Bliss*, 293 U. S. 144, 150, 55 S. Ct. 17, 79 L. Ed. 246, 97 A. L. R. 207; *Harrison v. Barker Annuity Fund*, 7 Cir., 90 F. (2d) 286, 288; *Cochran v. Commissioner*, 4 Cir., 78 F. (2d) 176, 179; *Produce Exchange Stock Clearing Ass'n v. Helvering*, 2 Cir., 71 F. (2d) 142, 143. Subdivision 14 relates to corporations which hold title and collect income for any tax exempt organization, and such organizations include many which are not embraced within subdivision 6. Hence, the fact that subdivision 14, as we have construed it, does not include corporations which operate a business, should not lead to the conclusion that subdivision 6, which does refer to operating corporations, includes only those which directly dispense their funds for the limited purposes there stated. No reason is apparent to us why Congress should wish to deny exemption to a corporation organized and operated exclusively to feed a charitable purpose when it undoubtedly grants it if the

corporation itself administers the charity. We think the language is adequate to describe both types

\* \* \*

"For the foregoing reasons we believe the petitioner was entitled to exemption and the order of the Board should be, and is, reversed."

## **2. Students Book Corporation Performs an Educational Function.**

Students Book Corporation is performing an essential function in connection with the operation of the educational activities of the State College of Washington.

College students must have books and other student supplies to enable them to pursue their studies, and it is essential that these be stocked in coordination with the college. If this service were not supplied by an agency such as the Students Book Corporation it would have to be furnished by the college itself, because the function is essential to the college operation. We think that if the college performed the function the income would be clearly exempt from taxation, notwithstanding that a charge might be made for the items.

The furnishing of text books and students' supplies we submit is an essential part of the educational activities of the college.

The activity of Students Book Corporation is carried on under the complete control of the college.

It will be noted that even before 1947, when the stock of the corporation was transferred to the Board of Regents of the college (R. 118-120), by Article 5, sec. 3 (c) of the Book Corporation's By-Laws (R. 87-88), all actions of its Board of Trustees were subject to approval by the president of the State College. Likewise, by the Constitution of the A.S.S.C.W., its actions were subject to

the college president's approval (R. 102). This control of the college officials over the affairs of the Book Corporation comes from their positions with the college, not their personal activities.

In this case, the Students Book Corporation performs functions essential to the educational activities of the college, and its ultimate control is, and has been, in the Board of Regents of the college. Its primary function is, therefore, educational. It is not simply a merchandising activity, but in effect, is the supply department of the college's educational activities.

The profits of the Students Book Corporation have inured, and shall continue to inure, to the benefit of the college (R. 14-18). The greater part of these profits has gone to the Student Union Building Project, which will become the property of the State of Washington when completed (R. 19, R. 69, R. 14).

When an exempt function is being performed by a corporation, and its profits are devoted to that purpose, it makes no difference that it also carries on commercial activities. It is true that there is some sale of merchandise to the general public (R. 18). However, that does not deprive a corporation, whose profits inure to the benefit of its exempt purpose, from its exemption. In the case of *Debs Memorial Radio Fund v. Commissioner of Internal Revenue*, 148 F. 2d 948 (2d Cir.), decided in 1945, the court considered the tax status of a corporation organized under the stock corporation laws of the State of New York, to engage in the business of broadcasting. The corporation was the successor to an organization formed for the purpose of conducting a free public radio forum for the dissemination of liberal and progressive



social views, and it was found that the corporation, formed in order to limit the personal liability of individuals responsible for the operation of the radio station, had adhered to the welfare purpose in the conduct of the corporate business. However, it was shown that the corporation carried on an extensive commercial broadcasting business, selling radio time to advertisers. The court said:

“ \* \* \* Nor is it fatal to exemption that substantially all of the petitioner's income is derived from commercial activities since the purpose of making profits has been to enable it to broadcast its educational, civic and cultural programs without charge. \* \* \* ”

The court went on then to cite numerous authorities and said:

“ \* \* \* In each of these cases, the taxpayer derived very large revenues from business activities but nevertheless was granted exemption under a clause similar to or identical with the one now under consideration. Consistently with these authorities we think the petitioner was ‘operated exclusively for the promotion of social welfare.’ The purpose of its commercial broadcasts has been to obtain funds to enable it to broadcast its educational, civic and cultural programs without charge \* \* \* .”

It will be noted that the court there held, that notwithstanding that the corporation in question carried on a commercial business, it could nevertheless be regarded as operated exclusively for an exempt purpose, since the destination of its income was the promotion of that purpose. In the same vein, the Circuit Court of Appeals for the second circuit, held in the case of *Bohemian Gymnastic Ass'n Sokol of City of New York v. Higgins*, 147 F. (2d) 774 (1945), that a membership corporation organized for educational purposes in giving athletic instruc-



tion, was entitled to exemption from federal social security taxes as an educational institution no part of the net earnings of which inured to the benefit of any private shareholder or individual.

This result was arrived at, notwithstanding that a substantial part of the earnings of the institution came from the profits of a restaurant and a bar. The court said:

“ \* \* \* In the case at bar the ultimate object to which the corporate income is devoted is to promote education. To that end all funds of the corporation, including membership dues, as well as the profits derived from the bar and restaurant and the receipts obtained from renting out the bowling alley, gymnasium or other parts of the building were destined. Therefore, Bohemian is exempt from the Social Security Tax claimed by the Collector unless the income from the bar and restaurant inured to ‘the benefit of any private shareholder or individual’ within the meaning of Section 1426 (b) (8) supra.”

The court then considered the question of whether the fact that its members benefited from the corporate activities took it outside the exemption.

The court said:

“ \* \* \* We have construed statutory exemptions somewhat narrowly in the case of social clubs and have treated income derived by them from outside sources, if considerable in amount and recurrent, as destroying the exemption. But in the case of educational or charitable corporations the exemption is construed boardly as we held that it should be in *Roche’s Beach, Inc. v. Commissioner*, 96 F. 2d 776, 779, supra. See also *Helvering v. Bliss*, 193 U. S. 144, 150, 55 S. Ct. 17, 79 L. Ed. 246, 95 A. L. R. 207; *Jones v. Better Business Bureau of Oklahoma City*, 10 Cir., 123 F. 2d 767, 769; *United States v. Proprietors of Social Law Library*, 1 Cir., 102 F. 2d 481, 482. If so construed, the words ‘inure to the benefit’ would, we think, require some benefit other than mere membership and a possible reduction in the amount of dues

contributed to the very educational or charitable objects for which the corporation was organized.  
\* \* \*

The reasoning of that case is applicable to the present situation. The bookstore performs a function for the college by supplying students with their tools of instruction, that is, their books and student supplies. The income derived from the activities of the bookstore corporation all go to the advancement of the educational institution. The fact that the bookstore makes profits is, we submit, incidental to its purpose, which is to make available the supplies which the students must have to carry on their educational pursuits.

Since the bookstore carries out an educational purpose the exemption should not be narrowly construed.

Under the authority of the cases cited in the foregoing quotations the destination of the income is the test, and if its destination is advancement of an educational purpose, the exemption may be liberally construed.

In the case of *Harrison v. Barker Annuity Fund*, 90 F. (2d) 286, the Circuit Court of Appeals for the 7th circuit, in speaking of the same exemption section as we now have under consideration, said:

"The statute, section 103 of the Internal Revenue Act of 1928 (26 U. S. C. A., § 103 and note), provides that corporations of foundations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals shall be exempt from taxation. Under this law, in view of the fact that bequests for public purposes operate in aid of good government and perform by private means what ultimately would fall upon the public, exemption from taxation is not so much a matter of grace or favor as rather an act of public justice. The reason for the rule of narrow scrutiny of a statute does not apply to such cases \* \* \*."

The use of the income of the Students Book Corporation to provide a Student Union building, title to which will inure in the State of Washington, is a patent example of what the court was referring to in the quotation just set out when it spoke of such corporations performing a service that would ultimately fall upon the public otherwise. The taxpayers of the State of Washington are relieved from the obligation of purchasing the land and constructing a Student Union building.

### **3. The Form of Plaintiff's Corporate Charter Does Not Defeat Exemption.**

It makes no difference in the present case that the Charter of the Students Book Corporation is in form such that it could engage in a general commercial business. The test for the purposes of exemption from income taxes is the purpose for which it is organized and operated, and that is not conclusively established by the language of the corporate charter.

In the case of *Appeal of Unity School of Christianity*, 4 B. T. A. 61, the Board of Tax Appeals discussed such a problem and said:

"It is said that the fact that the incorporation was under the business law is indicative of its commercial purpose. This might be significant if not otherwise explained, but it is not conclusive. A corporation so organized is not, merely because it is permitted thereby to engage in business, precluded from an exclusively charitable purpose. The purpose of its organization and operation is still a question of fact, and the evidence may be such as to show that its purpose was charitable despite the ordinary implications of the statute under which it was created.

"The suggestion also arises that the stated purposes expressed in the charter are entirely consistent with a corporation to be conducted for private gain—

that a school or a sanitarium is not necessarily charitable or non-profitable. And this, indeed, is true. By its charter this corporation might lawfully have been used as the means of increasing the wealth of its founders and stockholders. But the evidence is all to the effect that this was never the purpose or intent and has not been the effect. Looking to the purpose, as the statute requires, it becomes a question again of fact, as disclosed by evidence, and this is not determined by what might otherwise have been consistent with the charter.

"In considering whether a corporation is religious, charitable or educational, we must always be guided by the character of the organization and its activities. \* \* \* Congress left open the door of tax exemption to all corporations meeting the test, the restriction being not as to the species of religion, charity, science or education under which they might operate, but as to the use of its profits and the exclusive purpose of its existence."

This holding was approved by the Circuit Court of Appeals in the case of *Roche's Beach Inc. v. Commissioner of Internal Revenue*, 96 F. (2d) 776. To the same effect see *U. S. v. Pickwick Electric Membership Corporation* (6 Cir.) 158 F. (2d) 272. Thus, in the present case, the court should be guided by the facts as to the purpose of the organization and operation of the Students Book Corporation, rather than by the mere language of its corporate charter.

#### **4. Students Book Corporation is Integrated with Exempt Activities.**

Plaintiff's original capital came from the Associated Students of the State College of Washington (R. 12), an exempt institution which, in turn, was organized and operated under the authority and control of the Board of Regents of the State College of Washington (See Article 2, Const. A.S.S.C.W.) (R. 101).

The Students Book Corporation is, and always has been, a wholly owned subsidiary, either of the Associated Students, State College of Washington, or of the Board of Regents. (R. 13, R. 19, R. 49.) At all times it has been completely under the control of these agencies, and has been operated solely for their purposes, and in accordance with their directions (R. 71).

Its profits have inured to their benefit, and have been paid at their call, and have been used for purposes dictated by them (R. 69, R. 13-16).

All pecuniary benefit from the stock of this corporation has gone to the Associated Students and the State College (R. 14, R. 69). In fact, Students Book Corporation, while in form an independent entity, has always been the creature of those agencies. In fact, it has not been operated as an independent instrument for private profit (R. 66-68). In this case, Students Book Corporation is a subsidiary of the Associated Students, which in turn, is a subsidiary of the State College. They all contribute to the general educational purpose of the college.

In the case of *Commissioner of Internal Revenue v. Orton*, (6 Cir.) 173 F. (2d) 483, the 6th Circuit Court of Appeals held that an organization performing an educational function was entitled to an exemption, notwithstanding that its activities produced income through the sale of ceramic products.

The court said:

"The fact that the agency is productive is not alone controlling. In *Roche's Beach, Inc. v. Com'r*, 2 Cir., 96 F. 2d 776, 778, the court said:

"This does not mean that to come within the exemption a corporation may not conduct business activities for profit. The destination of the income is more significant than its source. \* \* \*



"And it cited the *Trinidad* case and two cases from the Board of Tax Appeals, to wit: *Sand Springs Home v. Com'r*, 6 B. T. A. 198, 214; *Appeal of Unity School of Christianity*, 4 B. T. A. 61; see also *Debs Memorial Radio Fund, Inc., v. Com'r*, 2 Cir., 148 F. 2d 948, 951; *United States v. Pickwick Elec. Membership Corp.*, 6 Cir., 158 F. 2d 272; *Bohemian Gymnastic Ass'n Sokol of City of New York v. Higgins*, 2 Cir., 147 F. 2d 774.

"We think that in the case before us the exemption clause of the statute should not be narrowly construed."

The case just cited is similar to the present one, in that the operation actually carried on tended to make a profit, but the ultimate end of the operation and the destination of the profits was for an educational purpose.

The actual operation of a corporation and the actual purpose for which it is formed governs, rather than the mere form of its corporate organization.

In the case of the *United States v. Pickwick Electric Membership Corporation*, 6 Cir., 158 F. (2d) 272, the 6th Circuit Court of Appeals said:

" \* \* \* The actual purpose is not controlled by the corporate form or by the commercial aspect of the business transacted, but may be shown by extrinsic evidence, including the by-laws and the method of operation. *Debs Memorial Radio Fund v. Commissioner, supra.* \* \* \*"

In the present case there are no members of the Students Book Corporation who individually profit from its operations. Its stock was formerly held by the Associated Students, and now is held in trust by the college Board of Regents to be used for purposes for which the Associated Students was organized (R. 24-25).

There is virtually no way in which its earnings could ever inure to the benefit of any private individual. There are no private stockholders (R. 49).



The fact that the Associated Students of Washington State College might at some time be dissolved, and there might be some disposition of its assets, is a remote contingency indeed, in view of the type of institution with which we are dealing.

The membership in the Associated Students is subject to constant change, as students enter and graduate from the college since regular membership is limited to under-graduate students (See A.S.S.C.W. By-Laws, Article 2, R. 137, R. 102).

The A.S.S.C.W. is simply not the type of institution that is likely ever to be so liquidated that its assets would be divided among its members. Particularly is this true since, by the recital in Article II, section 1 of its constitution, it exists solely under the authority of the Board of Regents, who would have full control of any such dissolution.

At any rate, the fact that the assets of the A.S.S.C.W. are increased by the profits of the book store does not mean that there is a profit to the individual members within the meaning of the exemption statute.

In the case of *United States v. Pickwick Electric Membership Corporation*, 158 F. (2d) 272, the 6th Circuit Court of Appeals said:

“\* \* \* The fact that the members may receive some benefit on dissolution upon distribution of the assets is a contingency too remote to have any material bearing upon the question where the association is admittedly not a scheme to avoid taxation and its good faith and honesty of purpose is not challenged. *Crooks v. Kansas City Hay Dealers Ass’n*, *supra*, 8 Cir., 37 F. 2d 83, at page 87.”

The Supreme Court of the United States has held that where one corporation is fully owned and controlled

by another, the two may be treated together for income tax purposes.

In the case of *Southern Pacific Company v. Lowe*, 247 U. S. 330, 62 L. Ed. 1142, the court held that the earnings of a wholly owned subsidiary were actually the earnings of the parent corporation, saying:

“ \* \* \* While the two companies were separate legal entities, yet in fact, and for all practical purposes they were merged, the former being but a part of the latter, acting merely as its agent and subject in all things to its proper direction and control. And, besides, the funds represented by the dividends were in the actual possession and control of the Southern Pacific as well before as after the declaration of the dividends. \* \* \* ”

The situation is exactly the one found in this case, because the Associated Students or the Board of Regents have at all times appointed the Board of Directors of Students Book Corporation, and have used it to serve their lawful purposes. Its dividends have been paid upon the call of the parent entity to serve its purposes.

Students Book Corporation and the Associated Students were engaged in one single enterprise aimed at serving the students of the college and bringing about the erection of the Student Union building for the benefit of the college. Their activities were so intertwined and inter-related, that notwithstanding their separate corporate entities, it was really only one activity.

Under such circumstances, the Supreme Court of the United States, in the case of *Gulf Oil Corporation v. Llewellyn*, 248 U. S. 71, 63 L. Ed. 133, said:

“ \* \* \* It is true that the petitioner and its subsidiaries were distinct beings in contemplation of law, but the facts that they were related as parts of one enterprise, all owned by the petitioner, that the

debts were all enterprise debts due to members, and that the dividends represented earnings that had been made in former years and that practically had been converted into capital, unite to convince us that the transaction should be regarded as bookkeeping rather than as 'dividends declared and paid in the ordinary course by a corporation.' *Lynch v. Hornby*, 247 U. S. 339, 346. The petitioner did not itself do the business of its subsidiaries and have possession of their property as in *Southern Pacific Co. v. Lowe*, 247 U. S. 330, but the principle of that case must be taken to cover this. \* \* \*

Thus, the Supreme Court of the United States has recognized that where a common enterprise is engaged in by two corporations, and one controls the other, the earnings of the subsidiary are considered the earnings of the principal corporation notwithstanding that the business of the subsidiary may be a separate phase of the enterprise than that carried on by the principal. So in the present case, notwithstanding that the book store is carrying on the merchandising part of the common enterprise of the college, the Associated Students and the book store, its activities must be regarded as a part of the whole.

The situation in this case is in striking contrast to situations in two other cases cited by appellant. The first of these is *Bear Gulch Water Company v. Commissioner of Internal Revenue*, 116 F. (2d) 975, where an exemption was denied by this court to a corporation whose stock was wholly owned by the Board of Regents of the University of California. The corporation in that case was engaged in the business of supplying water to several communities on the opposite side of San Francisco Bay from the college. The court pointed out that the college was not served by the company. The court further pointed out that no dividends were declared by the company and said:

“ \* \* \* Thus it is clear that in 1933 no part of petitioner's income accrued to Regents. For although Regents was petitioner's sole stockholder, petitioner's income was not Regents' income and did not accrue to Regents until a dividend payable therefrom was declared by petitioner. \* \* \*

“There was no finding nor any evidence warranting a finding that petitioner was merged with or became a part of Regents \* \* \* or the petitioner and Regents were parts of one enterprise. \* \* \*.”

That case is wholly unlike this. The regents there were simply investors in a business which itself had no connection with the educational activities of the college. For the tax year in question the income of the Water Company had not gone to the college, and there was no showing as to the destination of the income. The Water Company was not organized nor operated for the educational purpose, and it was not even shown that any income from it had accrued to the college. In all of those respects the case is different from the one now before the court.

The other case cited by appellants is one involving a college book store. That is the case of *Stanford University Book Store v. Helvering*, 83 F. (2d) 710, decided in 1936. But the situation presented was entirely different from that presented in this case.

The facts there were that the book store was a membership corporation, which students could join upon the payment of \$1.00. Such membership entitled the student to convert his receipts for purchases into dividends in the form of periodic rebates. The earnings thus accrued directly to the benefit of private individuals.

The court specifically found:

“ \* \* \* The university as such does not own

any interest in the association, is not responsible for its debts, is not entitled to any part of its earnings, and takes no part in conducting and managing its affairs. The two institutions are separate legal entities and therefore the attributes of the university cannot be attributed to the association, nor can the latter claim to be an educational institution because the university is such. The members of the faculty of the university, as such, were not charged with the duty of conducting the affairs of the association."

The court found that the Stanford Book Store was simply an independent merchandising establishment, its net earnings inured to the profit of its members. The facts were, that all of its earnings, except those required for operation, and a contingency reserve, were divided among its members. That case is in striking contrast with the present one, where the book store, even prior to 1947, was a wholly owned subsidiary of the Associated Students which in turn was subject to the supervision of the administration of the college and the Board of Regents.

Subsequent to 1947, the book store itself has been wholly controlled through the stock ownership of the Board of Regents of the college.

In the Stanford case, the University was not entitled to any of the earnings of the book store.

In the present case, virtually all of the earnings of the book store have actually inured to the benefit of the University through the purchase of land and the construction of a Student Union building, title to which will vest in the University.

In the present case there are no members of the Book Store Corporation, and there have never been any rebates or dividends accruing to anyone personally, but on the contrary, all the profits of the book store have accrued to the benefit of the college and its educational purpose.



With the stock all held by the Board of Regents and no control vested in the A.S.S.C.W., except to enforce the trust, there is no way in which the members of the Associated Students could require or bring about rebates, or the declaration of dividends, which would accrue to them as private individuals.

In the *Stanford* case, the court found that the members of the University faculty, as such, were not charged with the duty of conducting the affairs of the association.

The opposite is true in the present case, where the President of the college has a veto over all actions of the governing board of Students Book Corporation, and the comptroller of the college acts as Treasurer of the Book Corporation.

These responsibilities they exercise in their official capacities; not in their personal capacities, as in the case of the Stanford Book Store.

The Book Store at the State College of Washington is in every sense integrated with the educational activities of the college. It furnishes a service essential to such activities and such profits as arise from its operations accrue directly to the benefit of the college.

In this case the control of the President and the Board of Regents is a matter of their legal right under the By-Laws of Students Book Corporation, the By-Laws and Constitution of the A.S.S.C.W. and the trust agreement under which the Board of Regents holds the stock of Students Book Corporation.

This was unlike the situation in the Montana Students' Store case, cited by appellant, where the control was permissive rather than based upon any legal rights. In this case, the Associated Students itself, by its organic



articles, acknowledges that it exists only under the authority of the Board of Regents, and that organization has actually turned over the ownership and control of the bookstore stock to the Regents, and has put the relationship between the store and the college upon a definite legal basis.

Appellants, in their brief, have cited such cases as *Better Business Bureau v. United States*, 326 U. S. 279; *Universal Oil Products Company v. Campbell*, 181 F. (2d) 451, *Underwriters' Laboratories v. Commissioner*, 135 F. (2d) 371 and *Smythe v. California State Automobile Dealers Association*, 175 F. (2d) 752, as cases in conflict with the decision of the lower court in this case.

An examination of those cases will show they merely hold that organizations, having for their primary purpose the advancement of the profit making activities of their members do not qualify as educational institutions under the exemption statute simply because they carry on some instructional function. Those cases have no bearing upon this type of situation, where the activity of the principal is concededly educational, and the business corporation is carrying on a function which contributes, both materially, through furnishing an essential service, and financially, through supporting the State College in its activities, to the general educational purpose.

## VI. CONCLUSION

The Students' Book Corporation is the creature of exempt institutions. It operates solely to serve their purposes and to contribute its earnings to their support. It furnishes a service essential to the educational activities of the State College of Washington, and in the truest sense, is an educational activity.

Its earnings do not inure to the benefit of any private individual or shareholder, but become the property of the State of Washington, through investment in college land and buildings.

The Students Book Corporation is controlled completely by the Board of Regents, and the President of the State College, and is only incidentally a profit making activity.

It is truly organized and operated exclusively for an educational purpose, and no part of its net earnings inure to the benefit of any private individual or shareholder. As such, it is entitled to exemption.

Respectfully submitted,

SMITH TROY,  
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Attorneys for Appellee.*



No. 12759

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United States  
Court of Appeals  
for the Ninth Circuit.

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M. P. BARBACHANO and THE BORDER  
ELECTRIC AND TELEPHONE CO., INC.,

Appellants,

vs.

LAWRENCE W. ALLEN, WILLIS ALLEN,  
M. F. DEXTER and CINEMA ADVERTIS-  
ING AGENCY,

Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern District of California, Central Division  
Civil 827-H

M. P. BARBACHANO, THE BORDER ELECTRIC AND TELEPHONE CO., INC., a Corporation; RADIO DIFUSORA INTERNACIONAL S. A., a Corporation,

Plaintiffs,

vs.

LAWRENCE W. ALLEN, WILLIS ALLEN, CINEMA ADVERTISING AGENCY, M. F. DEXTER, ROBERT NOBLE, CALIFORNIA PENSION FOUNDATION, DOE ONE, DOE TWO, DOE THREE, DOE FOUR, DOE FIVE, DOE SIX, DOE SEVEN, DOE EIGHT, DOE NINE and DOE TEN,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF, FOR INJUNCTION, AND FOR RESCISSION AND DAMAGES

To the Honorable Judges of the District Court of the United States in and for the Southern District of California, Central Division:

Plaintiffs allege:

I.

At all times herein mentioned plaintiff, The Border Electric and Telephone Co., Inc., has been,



and at all times since on or about August 5, 1937, plaintiff Radio Difusora Internacional, S. A., has been, and each of said plaintiffs now is, a corporation duly organized, existing and authorized to do business under and pursuant to the laws and statutes of the Republic of Mexico. Both of said plaintiffs have their principal places of business and offices in the city of Tijuana in the territory of Baja California, Republic of Mexico, hereinafter referred to as "said territory" and "said Republic." [2\*]

## II.

Each and all of the plaintiffs have been at all times herein mentioned and now are citizens and residents of the Republic of Mexico.

## III.

Each and all of the defendants have been at all times herein mentioned and now are citizens and residents of the State of California, United States of America, in the District and Division aforesaid of this Honorable Court.

## IV.

Plaintiffs are presently unaware of the true capacities of the defendants Cinema Advertising Agency and California Pension Foundation, whether individual, corporate, partnership or otherwise, and plaintiffs ask leave of the Court to amend this complaint to set forth such true capacities when the same shall have been ascertained.

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

## V.

Plaintiffs are presently unaware of the true names or capacities, whether individual, partnership, corporate or otherwise, of the defendants Doe One, Doe Two, Doe Three, Doe Four, Doe Five, Doe Six, Doe Seven, Doe Eight, Doe Nine and/or Doe Ten, inclusive, or any of them, and plaintiffs ask leave of court to amend this complaint to state such true names and capacities when the same shall have been ascertained by plaintiffs.

## VI.

Plaintiffs are informed and believe, and upon the basis of such information and belief allege, that at all times, and in connection with all the matters hereafter mentioned, each and all of the defendants were acting as agents of, with the full knowledge and consent of, and for the use and benefit of, each of the other defendants herein. [3]

## VII.

On or about March 30, 1936, in said city of Tijuana, in said territory and Republic, plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., hereinafter called "Company 1," entered into that certain agreement in writing with the defendant Cinema Advertising Agency dated March 30, 1936, a copy of which is annexed as Exhibit "A" and made a part hereof. By the terms of said agreement it was provided that said plaintiffs should procure from said Republic of Mexico a license or concession for a radio station,

to be located at Rosarito Beach, in said territory and said Republic; that defendant Cinema Advertising Agency should pay all deposits or fees required by said republic in connection with the issuance of said license or concession, such deposits or fees to be payable after said plaintiffs had procured such issuance; that said plaintiffs should provide suitable lands and buildings at Rosarito Beach to house transmitter, studios and antenna for said radio station; that said plaintiffs should sell and deliver electric power for the operation of said radio station, as more particularly mentioned in paragraph No. 6 of said agreement; and that defendants Cinema Advertising Agency should construct said radio station at its own expense.

Subsequent to March 30, 1936, and prior to the events mentioned in paragraph IX, the parties to said agreement modified paragraph No. 5 thereof, in writing, to provide that said license or concession mentioned in said paragraph should be issued in the name of M. P. Barbachano instead of in the name of a company, as mentioned therein. Said agreement together with said modification are hereinafter collectively described as "said agreement."

### VIII.

At all times herein mentioned it was known and understood by all parties to said agreement that said plaintiffs would [4] have to expend approximately \$27,000.00, in order to provide said suitable lands and buildings and the facilities for said electrical power, as required by plaintiffs to be

furnished under said agreement; and that defendants would be required to expend not less than \$120,000.00 in order to construct said radio station as required by them to be constructed under said agreement.

### IX.

On or about September 25, 1936, said plaintiffs mentioned in paragraph VII procured the issuance by said Republic of a license and concession, hereinafter called "said concession," in the name of plaintiff M. P. Barbachano, for a radio station at said Rosarito Beach on a frequency of 730 kilocycles, all as provided in said agreement.

### X.

On or about September 25, 1936, said plaintiffs commenced the construction of said suitable buildings for said radio station, required by them under the terms of said agreement to be constructed, and the construction of electrical power facilities as provided in said agreement, and completed such construction thereof by on or about November 25, 1936, at a total cost to said plaintiffs of approximately \$27,000.00, which cost was then and has at all times since been and now is a reasonable cost for such construction.

### XI.

At all times herein mentioned said plaintiffs named in paragraph VII performed all the other terms and conditions required by them, or any of them, to be performed under said agreement.



## XII.

Under and pursuant to said concession and the conditions imposed by said Republic with respect to the exercise thereof, it was provided that said concession would be null and void on and [5] after October 5, 1936, unless 10,000 pesos in cash or satisfactory bond in same amount (that is to say, approximately \$2,777.77 at the then current rate of exchange between the American dollar and the Mexican peso) were deposited with said Republic on or before that date, to guarantee to said Republic for a period of twenty years the concessionnaire's faithful compliance with the terms of said license and concession.

## XIII.

Promptly following the events mentioned in paragraph IX and on or about September 25, 1936, plaintiffs caused the original of said concession to be delivered to defendants for their inspection, and copy and translation thereof to be delivered to them for their retention, and then and at all times thereafter until the events mentioned in paragraph XV, plaintiffs continued to call to the attention of defendants the provisions of said concession and said conditions imposed by said republic with respect to the exercise thereof, and at all said times made demand on defendants that they comply therewith and with said agreement requiring the payment of deposits and fees as aforesaid, particularly by causing to be deposited with said Republic, on or before October 5, 1936, said sum of 10,000 pesos (or approximately \$2,777.77 at the then current rate of

exchange between the American dollar and the Mexican peso) or said bond in amount mentioned in paragraph XII.

#### XIV.

At all times on and after September 25, 1936, defendants failed and refused to make said deposit mentioned in paragraph XII, or to construct said radio station as required by said agreement and said concession, or at all, or to perform said agreement, or to comply with the conditions of said concession, and have at no time made said deposit or constructed said radio station or performed the other terms or conditions of said agreement and concession [6] on their part required to be performed.

By reason of the matters hereinabove set forth, there was at all times since on or about September 25, 1936, and is now a failure of defendants to furnish the consideration required by them to be furnished plaintiffs under said agreement.

By reason of said failure of consideration and the failure and refusal of defendants to perform said agreement or to comply with the conditions of said concession as aforesaid, defendants are estopped to claim any rights in or to said concession, said suitable lands or buildings, said radio station, or under said agreement.

#### XV.

Promptly following said failure and refusal of defendants mentioned in paragraphs XIII and XIV, and on or about October 5, 1936, said plain-



tiffs duly notified defendants in writing that plaintiffs then and there elected to rescind said agreement and thereby terminate all rights of defendants thereunder, by reason of the failure and refusal of defendants to perform said agreement and to comply with the conditions of said concession.

#### XVI.

None of plaintiffs has anything of value belonging to or required to be restored to defendants or any of them.

#### XVII.

On or about October 5, 1936, said plaintiffs were compelled by reason of the matters mentioned in paragraphs XII and XIV to make, and said plaintiffs did make, deposit of bond in said sum of 10,000 pesos (or approximately \$2,777.77 at the then current rate of exchange between the American dollar and the Mexican peso) with the government of said Republic, out of said plaintiff's own funds, to prevent said concession from becoming null and void as aforesaid.

Said concession has at all times remained and now remains [7] in full force and effect.

#### XVIII.

On or about August 6, 1937, said plaintiffs caused to be duly sold, transferred and assigned to plaintiff Radio Difusora Internacional, S. A., herein called "Company 2," for and in consideration of the issuance of capital stock of Company 2 to M. P. Barbachano, said concession, said suitable lands and

buildings and certain materials, supplies, equipment, apparatus and other properties theretofore and subsequent to October 5, 1936, acquired by said plaintiffs in the construction of said radio station mentioned in paragraph IX. At all times on and after August 6, 1937, and to date hereof, Company 2 was and is the sole owner of said concession, said suitable buildings, lands, and said materials, supplies, equipment, apparatus and other properties.

### XIX.

By reason of said failure and refusal of defendants to perform said agreement and to comply with the conditions of said concession, as aforesaid, plaintiffs were compelled to and they did subsequent to on or about October 5, 1936, and up to on or about February 15, 1940, construct and complete said radio station at a cost of approximately \$120,000.00, in addition to the cost of buildings, lands and electrical facilities hereinabove described, which cost of approximately \$120,000.00 was at all of said times and now is the reasonable cost of construction and completion of said radio station.

### XX.

From and after about February 15, 1940, and at the present time said radio station has been and is in all respects ready for operation for the various commercial and other purposes as contemplated by said agreement, and such operation has been prevented and made impossible solely due to the acts of defendants [8] as hereinafter set out.

## XXI.

At a time or times on and after October 5, 1936, which time or times are not presently known to plaintiffs, defendants entered into a plan, design, combination and conspiracy to commit the acts hereinafter complained of.

Each of said acts was committed pursuant to said plan, design, combination and conspiracy.

Consistently and continuously since on or about October 5, 1936, defendants have caused to be made, published and communicated to various persons, including:

International Broadcasting Company, having an office at 412 Pershing Square Building, Los Angeles, California.

Andres Chacon, having offices at Apartado Postal 1097, Mexico City, Republic of Mexico.

J. A. Murphy, having offices at 756 South Spring Street, Los Angeles, California.

The Government of said Republic, including its Department of Posts and Telegraphs, Division of Radio Communications.

Bank of the Pacific, a Mexican banking corporation having offices in the city of Tijuana in said territory and Republic,

The Chamber of Commerce of said city of Tijuana, and other persons, statements to the effect that defendants are the owners of said concession and radio station, that none of plaintiffs had any rights therein, and that defendants would file suit and take other legal steps against persons doing

business with any of plaintiffs with respect to said concession or said radio station.

On or about September 3, 1937, defendants caused to be filed that certain action in this Honorable Court entitled Lawrence W. Allen vs. M. P. Barbachano, et al, 8018-H, basing their action upon alleged rights of defendants against plaintiffs [9] herein, under and pursuant to said agreement; and thereafter and on or about the same date defendants caused attachment in said action to be issued and levied upon said materials, supplies, equipment and apparatus mentioned in paragraph XVIII, then and there being used in the construction of said radio station by plaintiffs. Thereafter and at or about the latter part of September, 1937, plaintiffs were compelled to and did expend approximately \$2300 to secure bond for the release of said attachment, pursuant to the order of court in said action. On or about April 20, 1938, this Honorable Court by its order duly given and made, held said attachment to be improper and void from the beginning, and on or about 1939 said action 8108-H was dismissed by order of this court for lack of prosecution. By reason of said action, the wrongful attachment therein and consequent delay of plaintiffs in the construction of said radio station, plaintiffs were damaged in the approximate amount of not less than \$25,000.

## XXII.

Each of the statements and allegations of defendants referred to in paragraph XXI above were and now are in all respects false.

By reason of such statements, allegations and acts of defendants, persons otherwise willing to extend necessary credit and to do business with plaintiffs with respect to said concession and said radio station, have been and are unwilling to do so until a final determination of the claims of defendants, and are further unwilling pending such determination to purchase the radio time and facilities of said radio station.

### XXIII.

By reason of the conduct of defendants as hereinabove set forth, plaintiffs have been damaged in the total amount of \$177,077.77. [10]

Plaintiffs have been further damaged, and will in the future be damaged by reason of said conduct of defendants, in an amount or amounts not presently known to plaintiffs, and plaintiffs ask leave of court to amend this complaint to insert said amount or amounts when same have been ascertained.

### XXIV.

By reason of the conduct of defendants as hereinabove alleged and the consequent inability of plaintiffs to commence operation of said radio station although presently and at all times since on or about February 15, 1940, able to do so, plaintiffs are daily incurring great damage and sustaining great loss of profits, and will continue to do so unless defendants are restrained as hereinafter set forth.



## XXV.

By reason of the acts of defendants in connection with the matters hereabove in this complaint set forth, plaintiffs and each of them are threatened with great immediate and irreparable injury to themselves and their property, and such injury threatens to impair in value any order favorable to plaintiffs herein, unless defendants are restrained pending notice and a hearing herein, and thereafter to and after final judgment herein, from making, publishing or communicating among themselves or other persons doing business or seeking to do business with plaintiffs, or any of them, such statements or any of the statements or allegations of defendants as specifically mentioned in paragraph XXI, or any other similar statements or allegations to the effect that defendants claim to be the owners or rightful owners of said concession or said radio station, or that plaintiffs have no rights therein, or that defendants will sue or take other legal steps against persons doing business with plaintiffs with respect to said concession or radio station, and further restraining defendants from any other [11] activities interfering in any way, directly or indirectly, with the ownership and operation of said radio station by Company 2 or any of its assignees, or interfering with persons doing business or seeking to do business with said company or owning or seeking to purchase stock in said Company 2.



## XXVI.

Plaintiffs have no adequate remedy at law for the reasons, in addition to those hereinabove set forth, that such remedy at law would require a mutiplicity of suits and, plaintiffs are informed and believe and on that basis allege, that defendants are financially incapable of responding in damages for their liability herein.

## Second Cause of Action

## I.

Plaintiffs refer to paragraphs I, II, III, IV, V, VI, and VII of the first cause of action and make them a part hereof.

## II.

At the time of entering into said agreement of March 30, 1936, and at all times thereafter defendants were unable to and at no time intended to perform said agreement.

## III.

Plaintiffs refer to paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XIX, XX, XXI, XXII, XXIII, XXIV, and XXV of the first cause of action and make them a part hereof.

## Third Cause of Action

## I.

Plaintiffs refer to paragraphs I, II, III, IV, V, VI, VII and IX of the first cause of action and make them a part hereof.

## II.

At, and at all times after said agreement of

March 30, [12] 1936, was entered into by the parties hereto, said agreement was void, contrary to the public policy of and impossible of performance under the laws and statutes of said Republic of Mexico, including among other laws and statutes, Articles 12 and 30 of the Laws of General Ways of Communication of said Republic enacted August 29, 1932, and Organic Law of Fraction I of Article 27 of the Constitution of said Republic as adopted by the Congress of the Mexican Union on December 31, 1925.

At all times until on or about 1937, the matters hereinabove in this paragraph mentioned, were not known to plaintiffs although plaintiffs were at all times acting with reasonable care in the premises.

By reason of the matters hereinabove in this paragraph mentioned, said agreement of March 30, 1936, was entered into under a material mistake of law and fact, to wit: excusable ignorance of the fact that said agreement was null, void and impossible of performance under the laws and statutes and public policy of said Republic.

### III.

At all times since on or about 1937 plaintiffs have considered said agreement as without binding force or effect upon plaintiffs and have at all times notified defendants accordingly.

### IV.

Plaintiffs refer to paragraphs XVI and XVIII of the first cause of action and make them a part hereof.

## V.

From on or about September 25, 1936, to on or about February 15, 1940, plaintiffs caused said radio station and lands, buildings and electric power facilities incident thereto to be constructed and completed at a cost to plaintiffs of approximately \$149,777.77. Said cost of \$149,777.77 was at all times and now is the reasonable value of said construction and completion. [13]

## VI.

Plaintiffs refer to paragraphs XX, XXI, and XXII of the first cause of action and make them a part hereof.

## VII.

By reason of the conduct of defendants as hereinabove set forth, plaintiffs have been damaged in the total amount of \$149,777.77. Plaintiffs have been further damaged, and will in the future be damaged by reason of said conduct of defendants, in an amount or amounts not presently known to plaintiffs, and plaintiffs ask leave of court to amend this complaint to insert said amount or amounts when same have been ascertained.

## VIII.

Plaintiffs refer to paragraphs XXIV, XXV, XXVI of first cause of action and make them a part hereof.

## Fourth Cause of Action

## I.

Plaintiffs refer to paragraphs I, II, III, IV, V, VI, VII, IX, XII, XIII and XVIII of the first cause of action and make them a part hereof.

## II.

Defendants have failed and refused to perform said agreement or comply with the conditions of said concession. By reason of such failure and refusal plaintiffs have been compelled to, and they have expended approximately \$122,777.77 in maintaining said concession in full force and effect, and constructing said radio station, which sum was at all mentioned times and is the reasonable value of such maintenance and construction. Plaintiffs have duly performed all of the terms and conditions of said agreement required to be performed by them and have duly complied with the conditions of said concession, including expenditure by plaintiffs of approximately \$27,000, in providing said suitable [14] lands and buildings and said electric power facilities, which sum was at all times mentioned and is the reasonable value of said suitable lands and buildings and said electric power facilities.

## III.

Plaintiffs refer to paragraph XX of the first cause of action and make them a part hereof.

## IV.

At all times since on or about February 19, 1940, performance of said agreement of March 30, 1936, was and is impossible and unlawful under the laws and statutes of the Republic of Mexico, including among others, Article 403 of the Laws of General Ways of Communications enacted February 19, 1940.

Promptly following the events hereinabove in this paragraph, plaintiffs notified and continue to notify defendants thereof.

## V.

By reason of the matters hereinabove in this cause of action set out, defendants are estopped and prohibited from claiming any rights in or to said concession, and suitable lands or buildings, said radio station or under said agreement.

## VI.

Plaintiffs refer to paragraphs XVI, XXI, XXII, XXIII, XXIV, XXV and XXVI of the first cause of action and make them a part hereof.

Wherefore, plaintiffs pray judgment as follows:

1. For a declaration of this Honorable Court declaring and adjudging plaintiff Radio Difusora Internacional, S. A., a corporation, to be the lawful owner and holder of said concession, said buildings and grounds, and said radio station at Rosarito Beach hereinabove in this complaint described, and declaring that none of the defendants has any right, title or interest in or [15] under said agreement of March 30, 1936, or said concession, or said lands and buildings, or said radio station.

2. That the preliminary injunction heretofore duly made and given by the court following issuance of temporary restraining order, be continued unchanged, and in full force and effect pending final judgment.

3. For a permanent injunction on final hearing



herein, enjoining defendants and each of them from doing any of the acts hereinabove in this complaint complained of.

4. For damages in favor of plaintiffs in the sum of \$174,777.77.

5. For plaintiffs cost of suit and such other relief as the court deems just.

HARDY & HORWIN,

By /s/ LEONARD HORWIN,

Attorneys for Plaintiffs.

Points and Authorities

48 U. S. Stats. 955, as amended

49 Stats. 1927

28 U. S. C. A. 400

Maytag Co. v. Meadows Mfg. Co.,

35 Fed. (2d) 403

28 U. S. C. A. 32; 36 Stats. 1091

California Civil Code; sections 1667, 1689 [16]



## EXHIBIT "A"

Cinema Advertising Agency  
Cinema Building, 1731 North Highland Avenue,  
Hollywood, California  
Gladstone 2191

March 30, 1936.

"M. M. P. Barbachano,  
Border Electric & Telephone Co.,  
P. O. Box 337, San Ysidro, Calif.

Gentlemen:

The following is the agreement between us:

1. We will agree to construct, at our own expense, at Rosarito Beach, a radio broadcast station that will have an effective signal power of not less than 50,000 watts.

2. We will commence the construction of the station within 30 days after the permit therefor has been granted; and we will agree to have the station on the air and operating within 120 days thereafter.

3. We will furnish without cost to you such time for the broadcast of music, floor shows, and other activities of Rosarito Beach as you can advantageously use for the purpose of advertising the resort and its activities, not to exceed however, 30 minutes in the morning, 30 minutes at noon, 30 minutes at 6 p.m. and 30 minutes at midnight every day.

4. We will agree that following the announce-

ment of the call letters of the station at least 20 times every day, the call letters will be followed by the announcement that the station is "located at beautiful Rosarito Beach in Lower California" or some such similar announcement as you might suggest.

5. In consideration of all the foregoing, you will agree to furnish us, without cost, suitable buildings and grounds to house the transmitter and studios, the use of suitable land for [17] towers for new antenna (the antenna will be of the peculiar shape and size which we have explained to you); you will furnish your services in obtaining the license or concession from the government which license or concession is to be issued in the name of the company hereinafter mentioned in paragraph 9 hereof. However, all deposits or fees required by the government in order to obtain said concession will be paid by us after you have actually procured the issuance thereof. If the license or concession costs no more for 100,000 watts of power than it costs for 50,000 watts of power, as we understand to be the fact, then the permit is to be obtained for 100,000 watts of power.

6. Also you will agree to sell and deliver electric power for the operation of the said station upon the following basis: 2c per kilowatt hour, of which sum we shall actually pay to you only the sum of 1c per kilowatt hour, and the other 1c per kilowatt hour shall be credited to your purchase of 20% of the ownership of the company hereinafter

mentioned in paragraph 9. After your stock ownership in the company shall have been completely paid in this manner, you will agree to continue to sell and deliver electrical power for the operation of the station at two cents per kilowatt hour.

7. The term of this contract shall be for five years from the date hereof, and at our option, may be renewed from year to year for fifteen consecutive renewals.

8. It is understood, however, that the frequency upon which this station operates, and for which the license is to be granted, shall be one that is mutually agreeable. 730 kilocycles is an acceptable frequency at this time; if that frequency cannot be obtained then possibly we may designate some other frequency that would be acceptable.

9. In addition to the compensation that you are to receive in the way of advertising of Rosarito Beach on this radio station, [18] we agree to allow you to have organized for us at your own expense a suitable corporation, under the laws of Mexico, and to allow you to purchase 20% of the ownership of said company for a sum equal to 20% of the amount which is invested in said radio station for equipment and services necessary to eventually make the station a 100,000 watt station. You are to be allowed to pay for this 20% of the stock of said company by crediting to your payment therefor 1c per kilowatt hour in accordance with the provisions of paragraph 6 hereof. The remaining 80% of the stock of said company will be issued in the name

of our nominees. The management of policy of operation of the said station shall be left entirely to our discretion. The books and records showing the business of the station shall always be open for your inspection. We make no guarantee or representation as to how much the earnings of the station are expected to be; and the inducement to you to enter into this contract is the advertising which Rosarito Beach will receive from this station. Any dividends paid on the 20% of the stock issued to you will be credited on the purchase price of your stock until paid for, and the sums so credited will actually be paid to the other 80% of the stock until your stock is paid for.

Very truly yours,

CINEMA ADVERTISING  
AGENCY,

By /s/ LAWRENCE W. ALLEN.

Accepted:

M. P. BARBACHANO,  
Border Electric & Telephone Co.

By /s/ M. P. BARBACHANO.

We will also execute a contract to this same effect that will be legal in Baja California. When the corporation mentioned in paragraph 9 is organized you will be named as vice-president.

/s/ M. P. BARBACHANO,

CINEMA ADVERTISING  
AGENCY,

By /s/ LAWRENCE W. ALLEN. [19]

State of California,  
County of Los Angeles—ss.

Leonard Horwin, being duly sworn, says: That he is one of the attorneys for plaintiffs; that the facts in the above-entitled action are within his personal knowledge; that plaintiffs are unable to make the verification because they are absent from said County and for that reason affiant makes the verification on plaintiffs' behalf; that he had read the foregoing Amended Complaint of Plaintiffs, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief; and as to those matters he believes it to be true.

/s/ LEONARD HORWIN.

Subscribed and sworn to before me this 3rd day of June, 1940.

[Seal]     /s/ INEZ INGRAM,

Notary Public in and for Said  
County and State.

[Endorsed]: Filed June 4, 1940.



[Title of District Court and Cause.]

AMENDED ANSWER OF DEFENDANTS  
LAWRENCE W. ALLEN, WILLIS ALLEN,  
CINEMA ADVERTISING AGENCY, AND  
M. M. DEXTER AND COUNTER-CLAIM.

To the Honorable the Judges of the District Court  
Of the United States for the Southern District  
Of California, Central Division:

Defendants Lawrence W. Allen, Willis Allen,  
Cinema Advertising Agency, and M. M. Dexter ap-  
pearing and severally answering the amended com-  
plaint of the plaintiffs, admit, deny and allege as  
follows:

I.

First Defense

1. The first count of the plaintiffs' amended complaint fails to state a claim in favor of either of the plaintiffs against these defendants or either of them upon which relief can be granted.

2. The second count of the plaintiffs' amended complaint fails to state a claim in favor of either of the plaintiffs against these defendants or either of them upon which relief can be granted.

3. The third count of the plaintiffs' amended complaint fails to state a claim in favor of either of the plaintiffs against these defendants or either of them upon which relief can be granted.

4. The fourth alleged cause of action of the plaintiffs' amended complaint fails to state a claim



in favor of either of the plaintiffs against these defendants or either of them upon which relief [22] can be granted.

## II.

### Second Defense

1. As to paragraphs I, II, V, VI, X, XVII, XVIII, XIX, and XXX, of plaintiffs' amended First Cause of Action, these defendants and each of them allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs of plaintiffs' amended complaint and upon that ground deny the same and call for strict proof thereof.

## III.

### Third Defense

1. These defendants and each of them admit all of the allegations of paragraph VII except that they deny that on or about July, 1936, or at any other time or at all these defendants or either of them agreed either in writing or otherwise that paragraph V of the Agreement mentioned should be modified so that the concession therein mentioned should be issued in the name of M. P. Barbachano instead of to a company.

2. Admit the allegations of paragraph VIII of the plaintiffs' amended complaint except that they deny that defendants would be required to expend not less than One Hundred Twenty Thousand

(\$120,000.00) Dollars to construct said radio station under the agreement.

3. Answering paragraph IX defendants and each of them deny that a concession was issued on or about September 25, 1936, but admit that the concession was issued to M. P. Barbachano on August 31, 1936 for the defendants herein.

4. Deny each and all of the allegations of paragraph XI of plaintiffs' amended complaint.

5. Defendants severally deny each and every allegation contained [23] in paragraphs XII, XIII, XIV, XV, XVI, and XXI of plaintiffs' amended complaint excepting that these defendants admit they did notify International Broadcasting Company, Andres Chacon, J. A. Murphy, Government of the Republic including its Departments of Post and Telegraphs, Division of Radio Communications, the Bank of the Pacific, and a Mexican banking corporation at Tijuana, that they were the owners of the radio station and the concession and that neither of the plaintiffs had any right therein; excepting as to Paragraph XXI they admit that defendants filed action No. 8018-H in this honorable court and that they procured an attachment to be issued and levied upon the materials, supplies, equipment, and apparatus mentioned in Paragraph XIII, but deny that said attachment was dissolved by order of court and deny that a wrongful attachment was issued at all or that plaintiffs were damaged in the approximate amount of Twenty-five thousand (\$25,000.00) Dollars or in any amount or at all.

These defendants also deny all of the allegations of Paragraphs XXII, XXIII, XXIV, XXV, and XXVI.

#### IV.

##### Fourth Defense

To the Second and Separate Cause of Action of Plaintiffs' Complaint:—

1. Defendants replead and repeat their answer of admissions and denials to paragraphs I to VII both inclusive of plaintiffs' amended First Cause of Action.

2. Deny each and every allegation contained in Paragraph II of plaintiffs' amended Second and Separate Cause of Action.

3. Defendants repeat and replead their answers above set forth to paragraph VIII to XXV both inclusive of plaintiffs' amended First Cause of Action to paragraph III of plaintiffs' amended Second Cause of Action. [24]

#### V.

##### Fifth Defense

To Amended Third and Separate Cause of Action:

1. Defendants repeat and replead their answer of denials and/or admissions, to the First to Seventh paragraphs both inclusive of plaintiffs' amended First Cause of Action, but that defendants admit the allegations of Paragraph IX of plaintiffs' amended first Cause of Action except that they deny that the concession was issued on September 25, 1936.

2. Deny each and every of the allegations of paragraphs II, III, & IV of the plaintiffs' amended further Third and Separate Cause of Action.

3. As to the allegations of paragraph V of the plaintiffs' amended Third and Separate Cause of Action these defendants say that they have no knowledge or information sufficient to constitute a belief as to the truth of allegations contained in said paragraph and upon that ground deny each and every of said allegations and call for strict proof thereof.

Defendants repeat and replead their answer of denials and/or admissions to paragraphs XX, XXI, and XXII of the First Cause of Action in answer to paragraph VI of plaintiffs' amended Third and Separate Cause of Action.

Deny each and every of the allegations of Paragraph VII of plaintiffs' amended Third and Separate Cause of Action.

4. Defendants repeat and replead their answer of denials and/or admissions to paragraphs XXIV, XXV, and XXVI of plaintiffs' amended First Cause of Action and make such denials and/or admissions a part of their answer to paragraph VIII of plaintiffs' amended and separate Third Cause of Action.

## VI.

### Sixth Defense

To Plaintiffs' Amended Fourth and Separate Cause of Action

1. Defendants repeat and replead their answer

of denials [25] and admissions contained in their answer to the allegations of paragraphs I, II, III, IV, V, VI, VII, IX, XII, XIII, XVIII of plaintiffs' amended first Cause of Action in answer to paragraph I of plaintiffs' amended Fourth Cause of Action.

2. Defendants deny each and every of the allegations of paragraphs II, IV, and V of the Fourth Cause of Action of plaintiffs' amended complaint.

Defendants refer to, repeat, and replead their answer of denials and/or admissions contained in their answer to the allegations of paragraph XX of plaintiffs' amended First Cause of Action and make them a part hereof in answer to paragraph III of plaintiffs' amended Fourth Cause of Action.

Defendants refer to, repeat, and replead the answer of denials and/or admissions contained in their answer to the allegations of paragraphs XVI, XXI, XXII, XXIII, XXIV, XXV, and XXVI of plaintiffs' amended First Cause of Action, in answer to paragraph VI of the Fourth Cause of Action of plaintiffs' amended complaint.

## VII.

### Seventh Defense

That the plaintiffs are estopped to claim in their amended complaint that the defendants failed and refused to make the deposit of bond of 10,000 pesos to the Mexican Government and plaintiffs are estopped to claim that defendants were unable to and or never intended to construct said radio station, for the reason that plaintiffs concealed the date of



the issuance of the concession and the time within which the 10,000 pesos bond was required to be filed and by reason of the service upon defendants by the plaintiffs of a Notice of Rescission on October 5, 1936, and by reason of the filing of such bond by the plaintiff prior to the expiration of the time within which the defendants were required to so file said bond. [26]

## VIII.

### Eighth Defense

That the plaintiffs are estopped to claim in their amended complaint that the contract of March 30, 1939, by and between plaintiffs and defendants was broken and violated by the alleged failure of the defendants to construct the radio station at Rosarito Beach, by reason of the fact that the plaintiffs refused to turn over to a Sociedad Anonima, a corporation to be formed by the defendants, the radio concession issued by the Mexican Government on October 31, 1936, to M. P. Barbachano as the agent for the defendants; by an unlawful demand of the plaintiffs that the defendants give plaintiffs a bond in the sum of Ninety Thousand (\$90,000.00) Dollars not provided for in the contract of the plaintiffs and defendants for the construction of said radio station; that the plaintiffs are further estopped to claim that the said contract of March 30, 1936, by and between the plaintiffs and defendants was broken and violated by the defendants by reason of the fact that plaintiffs served a Notice of Rescission of said contract upon defendants on October 5, 1936,



and by reason of the fact that the plaintiffs themselves entered upon the construction of said radio station and excluded defendants from the premises and prevented them from entering upon said premises and constructing said radio station.

## IX.

### Ninth Defense

That the plaintiffs have waived that portion of the contract of March 30, 1936, which required the defendants to file bond with the Mexican Government in the sum of 10,000 pesos by concealing from the defendants the date of the issuance of said concession and the time within which said bond was required to be filed; by serving a Notice of Rescission of said contract of March 30, 1936, on October 5, 1936, before the time had expired within which the defendants were required to file said bond, and that plaintiffs [27] have further waived said portion of the contract of March 30, 1936, by themselves filing said bond before the time had expired within which the defendants were required to file the same.

## X.

### Tenth Defense

That the plaintiffs have waived right to claim and to assert that the defendants have violated and broken the contract of March 30, 1936, by failing and refusing to construct said radio station within the time provided in said contract, for the reason that the plaintiffs have concealed from said defend-

ants the date of the issuance of said radio concession, have made an unlawful and illegal demand upon defendants to furnish to plaintiffs a bond in the sum of Ninety Thousand (\$90,000.00) Dollars for the construction of said station, by plaintiffs' failure to turn over to Sociedad Anonima, the concession obtained from the Mexican government on August 31, 1936; by the serving upon the defendants of the Notice of Rescission of said contract of March 30, 1936, on October 5, 1936, and by the plaintiffs themselves constructing and entering upon the construction of said radio station before the expiration of the time within which the defendants were required by the contract of March 30, 1936, to construct the same, and by excluding defendants from the premises upon which the said radio station was to be constructed.

These Defendants by Leave of Court First Had in the Premises File This Their Amended Counter-Claim Against Plaintiffs M. P. Barbachana, R. S. Barbachano, the Border Electric and Telephone Co., Inc., a Corporation, Radio Difusora Internacional S. A., a Corporation, and for Cause of Action Allege:

### I.

At all times herein mentioned the plaintiff, Border Electric and Telephone Company, Inc., has been and now is a corporation duly organized, existing and authorized to do business under and [28] pursuant to the laws and the statutes of the Republic of Mexico; that said corporation was organized by,

is solely controlled by, and a majority of its capital stock is held by the plaintiffs, M. P. Barbachano and R. S. Barbachano.

Plaintiff, Radio Difusora Internacional, S. A., now is and at all times herein mentioned was a corporation organized, existing and authorized to do business under and pursuant to the laws and statutes of the Republic of Mexico; that the said corporation was organized by the plaintiff, M. P. Barbachano and R. S. Barbachano, for the purpose of taking over title to the concession and the radio station and equipment, and for the operation of the radio station at Rosarito Beach in the territory of Baja California; that its stock was to be issued and held in accordance with the provisions of the contract of March 30, 1936, between the parties herein; that defendants are informed and believe and so allege that when said Radio Difusora Internacional, S. A., had been incorporated and was organized, its capital stock was issued to M. P. Barbachano and R. S. Barbachano and that they are now holders of its issued capital stock and that said corporation is merely the alter ego of M. P. Barbachano and R. S. Barbachano, plaintiffs;

That the defendants and counter claimants Lawrence W. Allen, Willis Allen, and M. M. Dexter now are and at all times herein mentioned have been citizens and residents of the State of California, United States of America and of the Southern District and Central Division of the District Court of the United States; that the Defendant, Cinema Advertising Agency is the fictitious name of an adver-

tising business solely owned and controlled by Willis Allen and M. M. Dexter; that a certificate of said fictitious name has been duly filed in the County Clerk's office in the County of Los Angeles, State of California. [29]

## II.

That on March 30, 1936, a certain agreement in writing was entered into by and between the defendants, Cinema Advertising Agency, Lawrence W. Allen, Willis Allen and M. M. Dexter on the one part to and with M. P. Barbachano, R. S. Barbachano, and Border Electric and Telephone Company, Inc., a corporation, on the other part, whereby it was agreed that a concession for a radio station was to be obtained from the Mexican government through the services and efforts of the said M. P. Barbachano and Border Electric and Telephone Company, Inc., a corporation; that said concession was to be issued in the name of a Mexican corporation to be formed thereafter and that the defendants were to pay all deposits and fees required by said Republic of Mexico for the issuance of said concession or license; that the said M. P. Barbachano and the Border Electric and Telephone Company, Inc., a corporation, were to furnish suitable buildings and grounds at Rosarito Beach in Baja California to house the said radio station, its parts, and equipment and that said Barbachanos and The Border Electric and Telephone Company agreed to sell and deliver electric power for the operation of said radio station.



## III.

That on or about August 31, 1936, pursuant to the provisions of said contract a concession or franchise was issued by the Mexican government, and that the said M. P. Barbachano caused said concession and license to be issued in his own name; that defendants paid the costs and fees for the issuance of said concession in the sum of Seventeen Hundred (\$1700.00) Dollars and thereupon demanded that said concession be placed in the name of a corporation to be formed as provided in said contract of March 30, 1936; that plaintiffs refused to turn over said concession and demanded that defendants furnish plaintiffs a bond in the sum of Ninety Thousand (\$90,000) Dollars that [30] defendants would actually construct said station; that the contract of March 30, 1936, did not require defendants to execute or deliver a bond for the construction of the radio station nor had defendants ever agreed so to do; that plaintiffs knew at the time of making said demand that defendants had already contracted with a radio engineer to construct said station and had paid a part of the contract price and cost and that defendants intended to and were able to complete said station within the time and in compliance with contract requirements; that said demand of plaintiffs was made in bad faith and pursuant to an illegal and fraudulent conspiracy to deprive defendants of their rights and interests in and to said concession and radio station and the profits and emoluments arising out of its operation.

## IV.

That said concession was issued by the Mexican government on August 31, 1936; that it contained a provision that the concessionaire was to furnish a bond to the Republic of Mexico in the sum of 10,000 pesos within fifteen days from the date of the concession; that plaintiffs concealed from defendants the date of issuance of the concession and the time within which bond was to be furnished until October 3, 1936 that when defendants learned of the concealment they complained that the time had already elapsed whereupon plaintiffs claimed that they had secured an extension to and including October 5, 1936; that when defendants stated that they were then ready, able and willing to furnish a bond to the Mexican government in the amount of 10,000 pesos, plaintiffs refused to turn over the concession until another and additional bond in the sum of Ninety Thousand (\$90,000) Dollars had been given them for the construction of the radio station; that thereafter and before the expiration of the date within which said bond to the Mexican government was to be given under said extension of time, the plaintiffs served these [31] defendants with a Notice of Rescission of the said contract of March 30, 1936.

That defendants were prevented from filing said bond in the sum of 10,000 pesos with the Mexican government by the concealment, misrepresentation, fraud, act of rescission of the plaintiffs and the illegal demand of the said plaintiffs for a further and additional bond of Ninety Thousand (\$90,000) Dollars to them not provided for or required by the



contract of March 30, 1936; that defendants were ready, able and willing at all times to perform all of the acts and things required of them by the contract of March 30, 1936, but were prevented from so doing by the acts of the plaintiffs aforesaid.

## V.

That shortly after the execution of the contract of March 30, 1936, and on or about August 31, 1936, plaintiffs M. P. Barbachano, R. S. Barbachano, and Border Electric and Telephone Company, Inc., did unlawfully, wilfully, and fraudulently conspire, confederate, and combine together to deprive the defendants and each of them of their property and rights in and to the contract of March 30, 1936, in and to the concession of August 31, 1936, granted by the Mexican government and in and to the radio station and corporation to be formed to operate said station and in and to the good will, profits, earnings, and emoluments derived and to be derived from the operation of said station and the corporation holding the title thereto; that in pursuance of such unlawful and fraudulent combination, conspiracy and confederacy, plaintiffs did cause said concession to be issued in the name of M. P. Barbachano and did refuse to transfer the same to a corporation to be formed in accordance with the contractual obligation and did conceal from defendants the time within which a certain bond to the Mexican government was to be filed and did make certain conditions and demands [32] upon defendants which were unconscionable and not warranted by any provision or

requirement of the contract of March 30, 1936, and did prevent the defendants from forming a corporation and receiving the transfer of said concession to said corporation.

## VI.

That immediately after obtaining said concession from the Mexican Government the plaintiffs in pursuance of the conspiracy aforesaid represented themselves to be the owners of said concession and negotiated with a number of persons to purchase the same and to exclude defendants from all interest therein and from obtaining the said concession and from building the radio station and organizing the company for the operation thereof; that in further pursuance of such conspiracy aforesaid plaintiffs demanded of defendants that they execute a bond in the sum of Ninety Thousand (\$90,000.00) Dollars before the concession would be turned over to them or to their nominees. That such a bond was not required by the contract of March 30, 1936, or by no modification thereof and was demanded by plaintiffs to prevent the defendants from obtaining the concession or proceeding with the construction of the station and of performing their part of the contract of March 30, 1936.

## VII.

That by reason of the acts of plaintiffs hereinbefore set forth in pursuance of the unlawful conspiracy aforesaid the defendants have been deprived of the radio station and the corporation to operate it and of the earnings, profits, emoluments of said radio station provided for in the contract of March

30, 1936, from approximately January 1, 1937, to the present time amounting to the sum of Five Hundred Thousand (\$500,000.00) Dollars.

### VIII.

That by reason of the acts of the plaintiffs in connection with the matters hereinbefore in this counter claim set forth and each of them, defendants and counter claimants, have suffered [33] great damage and injury and will continue to suffer immediate, continuing and irreparable damage and injury to themselves, their property, and their rights; that the plaintiffs M. P. Barbachano, R. S. Barbachano and the Border Electric and Telephone Company have transferred and assigned to the Radio Difusora Internacional, S. A., a Mexican corporation, all of their right, title and interest in and to the contract of March 30, 1936, and in and to the concession obtained thereunder and in and to the radio station heretofore constructed at Rosarito Beach, Mexico; that the plaintiff, Radio Difusora Internacional, S. A., a corporation, has accepted said assignment, now holds the concession, the radio station in its name and in consideration of said transfer and assignment has transferred to M. P. Barbachano and R. S. Barbachano all of its capital stock and full control, management, and operation of said Difusora Corporation; that said corporation is merely the alter-ego of M. P. Barbachano and R. S. Barbachano; that said corporation had full knowledge of the circumstances under which the concession was issued to M. P. Barbachano that said M. P. Barba-

chano was merely the trustee and agent for the defendants herein and for the corporation to be formed by them, of the rights of the defendants in and to said concession and to the radio station to be constructed under said concession and that the said Radio Difusora Internacional, S. A., entered into the said conspiracy with the said M. P. Barbachano, R. S. Barbachano, and the Border Electric and Telephone Company, a corporation, to deprive the defendants of their interest in said concession and radio station; that the said Radio Difusora Internacional, S. A., a corporation, now holds the said concession and radio station as a constructive trustee for the defendants.

### IX.

That the plaintiffs have been operating said radio station at Rosarito Beach ever since February, 1940, and have been and are [34] receiving large returns and profits therefrom; that defendants are informed and believe that said profits, returns and proceeds from the operation of said station amount to a very great sum of money the exact amount of which these defendants have not been able to ascertain; that defendants are entitled to an accounting for all such profits, earnings, and emoluments and to a judgment therefor against the plaintiffs; that the plaintiffs are holding all of the profits, returns, proceeds, and emoluments from the operation of said radio station and concession as constructive trustees for the defendants and that defendants are entitled to a judgment for the turning over of said sums of money when ascertained.



## X.

That the plaintiffs are now operating said concession and radio station and are appropriating to their own use all of the proceeds, profits, and earnings thereof; that they intend to continue to operate said concession and station and to appropriate to their own use the profits and earnings thereof; that unless an injunction issues restraining and enjoining the plaintiffs from retaining possession of said radio station and concession; from refusing to transfer to the defendants the said concession, radio station and equipment thereof; from withholding from defendants and refusing to transfer to them or to their nominees a stock interest in the Radio Difusora Internacional S. A. equal to 80% of the total stock issue of said corporation and from excluding the defendants or their nominees from the premises, buildings, operating equipment and control, management and operation of said radio station and from said concession, the defendants may be irreparably damaged and injured; that no adequate remedy at law exists in favor of the defendants herein; that said property and premises and the concession and the radio station operating said concession are located in the Republic of Mexico and that the judgment of [35] a court of law and the process issued to enforce such judgment at law would be wholly ineffective in said Republic of Mexico; that the plaintiffs are financially incapable of responding in damages for their liabilities herein.

These defendants allege that they are informed and believe and so allege that the plaintiffs have

threatened to and may dispose of and sell the said concession, radio station and equipment and transfer out of their hands all of the stock in the Radio Difusora Internacional S. A., a corporation; that they have approached and negotiated with various persons, both American and Mexican, in an attempt to sell such station and concession to them; that they have made contact with divers persons to sell to them said concession and radio station and that unless an injunction issues herein restraining and enjoining said plaintiffs from selling, assigning, disposing of or incumbering, hypothecating or mortgaging said concession, the radio station or 80% of the stock in said Radio Difusora Internacional S. A., a corporation, held by the said plaintiffs, these defendants will suffer great loss and irreparable injury.

## XI.

That these defendants have done and performed all acts required of them under the contract which were not prevented by the acts of the plaintiffs as aforesaid; that they are entitled to a decree of specific performance requiring the plaintiffs to execute the contract of March 30, 1936, and to transfer to the defendants or their nominees the aforesaid radio concession, the radio station at Rosarito Beach and all of its operating equipment and 80% of the stock of the Radio Difusora Internacional S. A., a corporation; that defendants are willing and here offer to allow plaintiffs credit in the total amount of the cost of construction of the radio station at Rosarito Beach and of the installation of its equipment as



against any claim for damages, profits or [36] proceeds that may be due and coming to the defendants under any judgment or decree entered herein.

Wherefore, defendants demand judgment:—

1. For a declaration of this honorable court declaring and decreeing that M. P. Barbachano received and held said concession as trustee for defendants and that the defendants were and now are the true owners of the concession nominally issued to M. P. Barbachano on August 31, 1936, for the proposed radio station at Rosarito Beach, Mexico, and of the radio station and operating equipment constructed and operated at Rosarito Beach and of the grounds, premises, buildings, and appurtenances at said Rosarito Beach upon which the said radio station is located; that the said Radio Difusora Internacional S. A., a corporation, received and held and now holds said concession and the said radio station operating said concession and the lands, premises, buildings, and appurtenances upon which the said radio station is constructed and located as constructive trustee for the defendants.

2. That plaintiffs M. P. Barbachano, R. S. Barbachano, and The Border Electric and Telephone Company hold all the capital stock received by them or either of them from the Radio Difusora Internacional S. A., a corporation, as trustees for defendants or their nominee.

3. For an accounting of all moneys, profits, and earnings, earned and received by the said Radio

Difusora Internacional S. A., a corporation, and the plaintiffs from the operation of said radio station since it began broadcasting and for a judgment and decree requiring the plaintiffs to pay to defendants all such profits, earnings, receipts and moneys after first deducting therefrom the reasonable cost of construction and installation of said radio station, the cost of the initial bond to the Mexican Government and all operating costs of said station. [37]

4. For a decree requiring plaintiffs to specifically perform the terms of the contract of March 30, 1936.

(a) For a judgment and decree requiring the Radio Difusora Internacional S. A., a corporation and plaintiffs to transfer to defendants or their nominee 80% of the stock of the Radio Difusora Internacional S. A., or in lieu thereof to transfer and assign to defendants all right, title, and interest in and to the concession issued on August 31, 1936, and all right, title and interest in and to the Radio station and its operating equipment and the grounds, lands, buildings and appurtenances on which said station is located, to be used under the order of this court and in accordance with the terms and provision of the contract of March 30, 1936.

5. For a decree quieting the title to said concession and radio station, its operating equipment and the lands, buildings and appurtenances upon which said radio station is situated at Rosarito Beach in such Mexican Corporation as is provided to be formed in said contract of March 30, 1936, or

in the Radio Difusora Internacional S. A., a corporation, when the said Radio Difusora Internacional S. A., a corporation and the plaintiffs shall have issued and transferred to the defendants or their nominee 80% of its capital stock as provided in said contract of March 30, 1936.

6. For a judgment against plaintiffs for withholding the said concession from defendants and preventing them from constructing the radio station at Rosarito Beach and operating the same from January 1, 1937 to date amounting to the sum of Five Hundred Thousand (\$500,000.00) Dollars.

7. For a permanent injunction, and pending the hearing hereof for a restraining order and temporary injunction, restraining and enjoining said plaintiffs, their servants, agents, employees, and persons associated with them from selling, assigning or disposing of and from incumbering, hypothecating or mortgaging said concession, the radio station operating said concession, and 80% of the [38] stock in the said Radio Difusora Internacional S. A., a corporation. That upon a hearing hereof an injunction may issue restraining and enjoining the plaintiffs, their servants, agents, employees and persons associated with them from retaining possession of said concession and radio station and operate the same; from refusing to transfer to defendants the said concession, radio station and operating equipment thereof; from withholding from defendants and refusing to transfer to them or to their nominee a stock interest in the Radio Difusora Internacional

S. A., a corporation equal to 80% of the total stock issue of said corporation; from excluding the defendants or their nominee from possession of the premises, lands, buildings and appurtenances, the operating equipment and control, management and operation of said radio station and from the concession granted to operate said radio station.

8. That the defendants may have a judgment for their costs herein and a decree for such other and further relief as the nature of their case may require and to this Honorable Court shall seem meet.

/s/ WILLIAM SCHREIDER,  
Attorney for defendants and  
counter-claimants.

Duly verified.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 25, 1940. [39]

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[Title of District Court and Cause.]

PETITION FOR LEAVE TO FILE AMEND-  
MENT TO AMENDED COMPLAINT AND  
AMENDMENT TO PLAINTIFFS' REPLY  
TO DEFENDANTS' AMENDED COUNTER-  
CLAIM

Pursuant to Rule 15, Subdivision (a) of Rules of Civil Procedure for the District Courts of the United States, plaintiffs respectfully show that:

In their "Memorandum of Points and Authorities to Show that Plaintiffs are not Entitled to Introduce Evidence on the Subject of



Defendants Financial Resources'' defendants complain that plaintiffs' pleading herein is not sufficient fairly to apprise defendants of the charge of fraud.

Depositions of the defendants, Lawrence W. Allen and Willis Allen, and of their witness, W. H. Kindig, taken by plaintiffs on May 13, 1941, pursuant to the order of court duly made at pre-trial hearing, further confirm the validity of the charge of fraud heretofore made by plaintiffs, and furnish additional information concerning the issue created by the charge and denial thereof. Because of the importance of said issue of fraud, plaintiffs, while continuing to deny the validity of defendants' contention in their said memorandum, nevertheless desire to amplify their charge of defendants' fraud by the amended pleadings hereunto attached, so as to leave no room for further contention as to sufficiency of said pleadings, and so as to give defendants every opportunity to meet the evidence offered by plaintiffs.

Wherefore, plaintiffs respectfully pray that the court [54] make its order granting plaintiffs leave to file the attached amendment to plaintiffs' amended complaint and amendment to plaintiffs' reply to defendants' amended counter-claim.

Respectfully submitted,

HARDY & HORWIN,

By /s/ LEONARD HORWIN,

Attorneys for Plaintiffs.

Dated: May 19th, 1941.

ORDER

It is ordered that plaintiffs may file amendment to amended complaint and amendment to reply to the amended counterclaim as prayed for herein, and that defendants may have until May 26, 1941, to answer said amendment to the amended complaint.

May 20, 1941.

/s/ H. A. HOLLZER,  
Judge. [55]

[Title of District Court and Cause.]

AMENDMENT TO PLAINTIFFS'  
AMENDED COMPLAINT

Pursuant to the order of Court heretofore duly granting leave to plaintiffs, plaintiffs herewith amend their amended complaint by adding thereto a fifth cause of action as follows:

Fifth Cause of Action

I.

Plaintiffs refer to Paragraphs I, II, III, IV, V, VI and VII of the first cause of action and make them a part hereof.

II.

Prior to, at the time of entering into and at all times subsequent to said agreement of March 30, 1936, until on or about September 25, 1936, defendants then and there represented and stated to plain-



tiffs that defendants were ready and financially able to pay the cost of procuring said concession and of constructing said radio station, and further represented and stated that they then and there had sufficient assets on hand to enable them to pay for said cost of procurement and construction out of their own funds.

### III.

Plaintiffs relied upon the defendants' representations and statements mentioned in Paragraph II hereof at all times until [56] on or about September 25, 1936, and would not have entered into said agreement of March 30, 1936, with defendants in the absence of said representations and statements of defendants.

### IV.

At all times mentioned in this cause of action each of said representations and statements set forth in Paragraph II hereof were false and known by defendants to be false, and the true facts at all said times were that defendants were not ready or able to pay for the cost of procurement of said concession and of constructing said radio station and did not have on hand sufficient, or any, assets necessary to pay said cost of procurement and construction.

### V.

Plaintiffs refer to Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV and XXV of

the first cause of action and make them a part hereof.

Respectfully submitted,

HARDY & HORWIN,

By LEONARD HORWIN,

Attorneys for Plaintiffs.

Dated: May 19th, 1941. [57]

[Title of District Court and Cause.]

PLAINTIFFS' AMENDMENT TO THEIR  
REPLY TO DEFENDANTS' AMENDED  
COUNTER-CLAIM

Pursuant to the order of Court heretofore duly granting leave to plaintiffs, plaintiffs herewith amend their Reply to Defendants' Amended Counter-Claim by adding thereto a Seventh, Separate and Affirmative Defense.

Seventh Defense

I.

Plaintiffs refer to Paragraphs I, II, III, IV, V, VI and VII of the first cause of action of their amended complaint and incorporate said paragraphs herein.

II.

Prior to, at the time of entering into and at all times subsequent to said agreement of March 30, 1936, until on or about September 25, 1936, defend-

ants then and there represented and stated to plaintiffs that defendants were ready and financially able to pay the cost of procuring said concession and of constructing said radio station, and further represented and stated that they then and there had sufficient assets on hand to enable them to pay for said cost of procurement and construction out of their own funds.

### III.

Plaintiffs relied upon the defendants' representations and [58] statements represented in Paragraph II hereof at all times until on or about September 25, 1936, and would not have entered into said agreement of March 30, 1936, with defendants in the absence of said representations and statements of defendants.

### IV.

At all times mentioned in this defense each of said representations and statements set forth in Paragraph II hereof were false and known by defendants to be false, and the true facts at all said times were that defendants were not ready or able to pay for the cost of procurement of said concession and of constructing said radio station and did not have on hand sufficient, or any, assets necessary to pay said cost of procurement and construction.

### V.

Plaintiffs refer to Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV and XXV of the

first cause of action of their amended complaint and incorporate said paragraphs herein.

Respectfully submitted,

HARDY & HORWIN,

By LEONARD HORWIN,

Attorneys for Plaintiffs.

Dated: May 19th, 1941.

[Endorsed]: Filed May 20, 1941. [59]

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[Title of District Court and Cause.]

AMENDMENT TO PLAINTIFFS'  
AMENDED COMPLAINT

Pursuant to the order of Court heretofore duly granting leave to plaintiffs, plaintiffs herewith amend their amended complaint by adding thereto a fifth cause of action as follows:

Fifth Cause of Action

I.

Plaintiffs refer to Paragraphs I, II, III, IV, V, VI and VII of the first cause of action and make them a part hereof.

II.

Prior to, at the time of entering into and at all times subsequent to said agreement of March 30, 1936, until on or about September 25, 1936, defendants then and there represented and stated to plaintiffs that defendants were ready and finan-

cially able to pay the cost of procuring said concession and of constructing said radio station, and further represented and stated that they then and there had sufficient assets on hand to enable them to pay for said cost of procurement and construction out of their own funds.

### III.

Plaintiffs relied upon the defendants' representations and statements mentioned in Paragraph II hereof at all times until [61] on or about September 25, 1936, and would not have entered into said agreement of March 30, 1936, with defendants in the absence of said representations and statements of defendants.

### IV.

At all times mentioned in this cause of action each of said representations and statements set forth in Paragraph II hereof were false and known by defendants to be false, and the true facts at all said times were that defendants were not ready or able to pay for the cost of procurement of said concession and of constructing said radio station and did not have on hand sufficient, or any, assets necessary to pay said cost of procurement and construction.

### V.

Plaintiffs refer to Paragraphs VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV and XXV of



the first cause of action and make them a part hereof.

Respectfully submitted,

HARDY & HORWIN,

By /s/ LEONARD HORWIN,  
Attorneys for Plaintiffs.

Dated: May 19th, 1941.

[Endorsed]: Filed May 20, 1941. [62]

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[Title of District Court and Cause.]

## MEMORANDUM OF CONCLUSIONS

September 17, 1941

Judge Hollzer.

It appearing that this cause was tried upon the issues raised by the amended complaint, the amendment thereto, the answer to said amended complaint and to said amendment thereof, the amended counterclaim, the reply to said amended counterclaim and the amendment to said reply, subject to certain modifications all as more particularly stated in the pre-trial order filed herein; and

It further appearing that at the trial of this cause the defendants abandoned all claims to equitable relief, including specific performance, and have limited the affirmative relief herein sought by them to the remedy of damages for alleged breach by the plaintiffs of the contract hereinafter mentioned; and



It further appearing that the respective parties have stipulated to and otherwise admitted certain facts, all as more particularly set forth in said pre-trial order; and

It further appearing that under date of March 30, [71] 1936, plaintiffs M. P. Barbachano and Border Electric and Telephone Co. entered into a certain written contract with defendants Lawrence W. Allen, Willis Allen and M. F. Dexter, said contract having been signed on behalf of said defendants under the name of Cinema Advertising Agency by said Lawrence W. Allen, a copy of which said contract is attached to the complaint and marked Exhibit A therein; and

It further appearing that said contract was prepared by said defendants and that subsequent to the execution thereof the same was modified so as to provide that the concession therein mentioned might be obtained in the name of said M. P. Barbachano and thereafter transferred by him to the corporation mentioned in Paragraph 9 of said contract; and

It further appearing that during the negotiations leading up to the execution of said contract, also at the time of entering into the same and from time to time thereafter up until the early part of October, 1936, said defendants repeatedly represented to said plaintiffs that they were financially able and ready to pay the cost of procuring the radio concession from the Mexican government mentioned in said contract, also to provide all deposits or equivalent bonds required in con-

nection with such concession, and also to pay the cost of constructing, erecting and installing the radio station described in said contract, including all drawings, blue-prints, plans, specifications, equipment and parts for the same, that from time to time subsequent to the execution of said contract and up until about the early part of October, 1936, while plaintiffs were engaged in good faith in conducting negotiations with the Mexican [72] government for the purpose of obtaining said concession, said defendants, for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract and for the purpose of inducing said plaintiffs to believe that they were financially able and ready to do the things hereinbefore mentioned, represented to said plaintiffs that said radio stations to be constructed by them as aforesaid would cost when completed not less than the sum of \$90,000, that during said last mentioned period and for the same purposes said defendants from time to time represented to said plaintiffs that they had sufficient assets on hand to enable them to meet said financial requirements and further represented to said plaintiffs that they had expended the sum of \$30,000 on account of \$90,000 worth of equipment for said radio station, and further represented to said plaintiffs that the sum of \$1700, which as hereinafter mentioned they remitted to said plaintiffs, had been obtained by them by the sale of government bonds allegedly owned by them; and

It further appearing that at all times mentioned herein up until the early part of October, 1936, said plaintiffs believed the aforementioned representations and relied upon the same and were induced to and did act thereon and continued to treat said contract as being in full force and effect and to perform their obligations thereunder, until the early part of October, 1936, as hereinafter stated; and

It further appearing that at no time involved herein did said defendants or either or any of them have funds or assets or other means to meet the aforementioned financial requirements or any substantial portion thereof, that at no time involved herein were said defendants or was either or any of them financially able or ready, either wholly or [73] in any substantial degree, to pay the cost of procuring said radio concession or to provide the deposits or equivalent bonds required in connection with said concession, or to pay the cost of constructing, erecting or installing said radio station, that at all times involved herein said defendants were insolvent and judgments totalling several thousand dollars were outstanding and unpaid against each of the defendants Lawrence W. Allen and Willis Allen, that said defendants did not, nor did either or any of them, pay the sum of \$30,000 or any other sum on account of equipment for said radio station, that the aforementioned sum of \$1700 was not obtained by them by the sale of Government or any bonds owned by them, but instead was obtained by them from a party who

borrowed said sum in varying amounts from various members of the public interested in securing legislation establishing old age pensions, that it was the purpose and intention of said defendants to endeavor to raise funds required to obtain and maintain said radio concession and to construct, equip and install said radio station, through the sale of stock in the Mexican corporation proposed to be organized under the terms of said contract, and to which corporation it was contemplated said M. P. Barbachano would transfer said concession after the same had been issued to him by the Mexican government; and,

It further appearing that at all times involved herein, it was the purpose and intention of said defendants to expend not to exceed the sum of \$30,000, if they could procure the same, for the construction, equipment and installation of said radio station and for the fees, deposits and bonds required in connection therewith and the concession [74] pertaining to the same, that said defendants at all times up to the early part of October, 1936, concealed this fact from the plaintiffs, that likewise in the opinion of the engineer whom said defendants consulted with respect to preparing plans and specifications for the construction of such station, said sum of \$30,000 would not have been sufficient to pay the cost of radio antennae, the special structure required for housing the transmitter, the wages of the workmen needed to construct and install the same, and the required deposits and fees, in addition to the cost of con-



structing, equipping and installing said station; and

It further appearing that for the purpose of providing the land upon which said defendants were to construct said radio station, said plaintiffs, at their own expense, on or about June 19, 1936, caused to be removed the building and equipment comprising radio station XEAQ from the premises where the same was then located at Rosarito Beach, Lower California, Mexico, and thereupon notified defendants of that fact; and

It further appearing that on September 19, 1936, the Mexican Government delivered to a representative of plaintiff M. P. Barbachano, at Mexico City, a concession issued in his name for a radio station of the character described in said contract of March 30, 1936, such station to be designated by the letters XERB, that said concession was received by said M. P. Barbachano at Tia Juana, Mexico, on or about September 24, 1936, that on the same day he informed said defendants by telephone of the issuance and receipt of said concession, that on the following day said defendants were permitted to and did inspect said concession and were furnished a typewritten copy and also an English translation thereof, [75] that at the same time said M. P. Barbachano made demand upon said defendants that they furnish 11,000 pesos or a bond in that amount for deposit with the Mexican government on or before October 5, 1936, as required by the terms and conditions of said concession and the law of Mexico, and thereafter

and up until the early part of October, 1936, he repeated said demand; and

It further appearing that under the Mexican law said concession, although bearing date of August 31, 1936, was effective as of the date of its delivery, to wit, September 19, 1936, and under the terms and conditions of said concession and the law of Mexico said concession would have become void in the event of failure to deposit with the Mexican government 11,000 pesos or a bond in that amount within fifteen days after the effective date of said concession; and

It further appearing that at all times involved herein it was known to all of the parties to said contract that said plaintiffs would be obliged to expend approximately the sum of \$27,000 to provide suitable land, buildings and electric power facilities as required by said contract, that said plaintiffs began the construction of such buildings and facilities for said radio station on or about September 25, 1936, and completed the same on or about November 25, 1936; and

It further appearing that on several occasions, particularly during September, 1936, for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract of March 30, 1936, and for the purpose of inducing said plaintiffs to believe that they were financially able and ready to do the things [76] required of them by said contract as hereinbefore mentioned, said defendants represented to said plaintiffs that they had entered into a written con-



tract with Federal Radio and Television Company for the construction, equipment and installation of the radio station required to be built by said defendants under the terms of said contract of March 30, 1936, and further represented that the cost thereof would amount to the sum of \$90,000 and that they had expended the sum of \$30,000 on account toward the purchase of the equipment for such station, and further represented that they were able to complete the construction of said station within the time and in accordance with the conditions required by said contract of March 30, 1936, whereas in truth said defendants did not, nor did either or any of them, enter into any contract of that character or expend such sum or any other amount toward the purchase of the equipment for such station, that on the contrary, and under date of September 28, 1936, said defendants through said Lawrence W. Allen entered into a written contract with one G. W. Berger, then doing business under the name of Federal Radio and Television Company, under the terms of which contract said Berger was employed, for a fee of \$335.00, to prepare and furnish to said defendants schematic drawings together with blue prints thereof showing everything necessary, convenient and customary for the construction of radio station XERB at Rosarito Beach as per said concession, also to prepare and furnish to said defendants complete plans and specifications for the construction, erection, installation and operation of said station, also to furnish complete and detailed estimates of the net costs

of all parts, material, labor and other expenses necessary for the construction, erection, installation and equipment of [77] said station, that likewise under the terms of said contract with Berger it was provided that within a period of not exceeding 60 days after delivery of the aforementioned documents said defendants were entitled to avail themselves of his services for the construction, erection and installation of said radio station at the compensation of \$75.00 per week for a minimum period of ten weeks and a maximum of twelve weeks, plus the additional sum of \$665.00 to be paid ten days after approval by the Mexican government of the complete installation of said station, also that it was recited in said contract with Berger that he was rendering his services at reduced figures for the purpose of establishing his reputation for the construction of high power stations, and that the reasonable market value of the services, labor, equipment and parts that will be represented by said station when complete would be not less than \$90,000, also that it was recited in said contract with Berger that when said station had been completed and all payments mentioned in said contract had been made said Berger would furnish to said defendants if requested a receipted bill of sale for said labor, parts and material of completed equipment, showing payment of the sum of \$90,000, also that it was recited in said contract with Berger that in the construction, erection and installation of said equipment and station, he would obtain all possible discounts in the purchase of parts and

equipment and that he would construct said station in accordance with the highest and most advanced and accepted practice; and

It further appearing that in spite of the recitals and representations in said Berger contract to the contrary it was understood at all times between him and said defendants that not to exceed the sum of \$30,000 would be expended [78] for the drawings, blue-prints, plans and specifications, and for the construction, erection and installation of said radio station, including all equipment and parts for the same; and

It further appearing that it was understood and contemplated by the parties to said contract of March 30, 1936, that the formation and organization of the corporation to be created under the laws of Mexico as mentioned in said contract would not be commenced until said radio concession had been issued to said M. P. Barbachano; and

It further appearing that under Mexican law it would take from fifty to seventy-five days to form and organize such corporation and to obtain from the appropriate officials authorization to transfer said concession to such corporation, that likewise under Mexican law it would be necessary that twenty-five thousand pesos, equivalent to about \$7,000, be provided as paid-up capital of such corporation as a condition precedent to the formation and organization thereof, and that at no time involved herein were said defendants or was either of them or any of them able to furnish the same; and

It further appearing that at no time involved herein did said defendants or either or any of them furnish or tender or show any evidence of ability to furnish 11,000 pesos or a bond in that amount, as required for deposit with the Mexican government under the terms and conditions of said concession, that at no time involved herein were said defendants, or was either or any of them, able to pay for or arrange for the construction or equipment or installation of such radio station; and

It further appearing that upon learning that said concession had been issued to M. P. Barbachano said defendants, [79] prior to October, 1936, and again in the early part of October, 1936, demanded that said concession be turned over to them, that thereupon said plaintiffs refused to cause said concession to be turned over to or transferred to said defendants and demanded that the latter furnish 11,000 pesos or a bond in that amount as required for deposit with the Mexican government under the terms of said concession, and in addition demanded that said defendants furnish a bond in the sum of \$90,000 guaranteeing the completion of the construction, equipment and installation of said radio station, that said demand to furnish said bond at \$90,000 was made by plaintiffs upon and after learning of the falsity of the aforementioned representations made by said defendants and learning that they were insolvent and after they had failed to furnish said eleven thousand pesos or equivalent bond; and

It further appearing that upon and because of the failure of said defendants to furnish said eleven



thousand pesos or equivalent bond said plaintiffs caused a bond in that amount to be deposited with the Mexican government on or about October 5, 1936, and thereby kept said concession in full force and effect; and

It further appearing that at all times involved herein a radio station is deemed under Mexican law to include the lands and the buildings whereon and wherein the same is situated, that likewise under Mexican law no alien or his nominee may use or own or be a stockholder in a Mexican corporation using or owning land in Mexico situate within 100 kilometers from any of its borders or within 50 kilometers from any of its shores, that said Rosarito Beach where [80] said radio station was required to be erected under the terms of said contract of March 30, 1936, was located at all times involved herein less than 100 kilometers south of the Mexican border adjoining the United States and less than 50 kilometers from the Pacific shoreline of Mexico, and that likewise on February 19, 1940, a law enacted by the Congress of Mexico went into effect prohibiting the ownership of a Mexican radio station by an alien or by a corporation having an alien stockholder, and that said law further provided that such ownership would constitute ground for cancelling any radio concession held by an alien or by such corporation; and

It further appearing that on October 5, 1936, said plaintiffs caused to be served on said defendants a notice of rescission of said contract of March 30, 1936, upon the terms and conditions all as more

particularly set forth in that certain instrument admitted in evidence herein and marked defendants' Exhibit A, that at the same time and upon the terms and conditions mentioned in said instrument said plaintiffs offered to return to said defendants the sum of \$1700 theretofore advanced by the latter to the plaintiffs to be paid, and which they did pay, to the Mexican government in connection with said concession, that said defendants rejected said offer, that thereafter said plaintiffs withdrew said offer and elected to apply said sum toward the recoupment of the damages suffered by them as a result of the failure of said defendants to build said radio station and otherwise carry out the terms of said contract of March 30, 1936; and

It further appearing that on September 3, 1937, said defendants caused to be filed in this court a certain civil [81] action designated as No. 8108-H, wherein said Lawrence W. Allen was named as plaintiff and the plaintiffs herein were there named as defendants, that the alleged cause of action pleaded in the complaint filed in said action was one seeking the recovery of \$2041.00 alleged to have been received at sundry times between August 18, 1936, and September 30, 1936, by the within-named plaintiffs from defendant Dexter doing business under the name of Cinema Advertising Agency, that thereafter and on September 10, 1937, the defendants herein caused an amended complaint to be filed in said action, setting forth two counts, the first count being identical with the original



complaint filed therein, and the second count setting forth a purported cause of action wherein it was alleged that at sundry times between January 2, 1936, and October 1, 1936, said Dexter had performed work and rendered services to the within-named plaintiffs at their request for the construction, installation and operation of a radio station and that said services were reasonably worth the sum of \$5,000, that in said action No. 8108-H the within-named defendants on September 3, 1941, caused a writ of attachment to be levied upon various materials, supplies, equipment and apparatus then being manufactured and assembled, and all of which were needed, for the construction, equipment and installation of said radio station to be built at Rosarito Beach, that by reason of such attachment the plaintiffs herein were prevented from completing the construction, equipment and installation of said station within the time required by said concession and the law of Mexico, that because of such delay the Mexican government declared said concession terminated and void, that as a consequence, said M. P. Barbachano, acting on behalf of the plaintiffs, was [82] compelled to and did take steps and expend monies in the additional amount of \$10,000 in order to procure the reinstatement of said concession; and

It further appearing that on or about August 6, 1937, said M. P. Barbachano transferred to the plaintiff Radio Difusora Internacional, a corporation, said concession, also said radio station and appurtenances in the condition then existing at said

Rosarito Beach, in consideration of the issuance of all its capital stock to him, and that ever since said date said Radio Difusora Internacional has been and still is the owner of said concession, radio station and appurtenances; and

It further appearing that by said action No. 8108-H said defendants elected to treat said contract of March 30, 1936, as having been rescinded and to sue to recover the monies advanced by them as aforesaid to said plaintiffs in the amount of \$1700.00 plus the further sum of \$335.00 paid by them to said Berger under the terms of the aforementioned contract made with him under date of September 28, 1936; and

It further appearing that said plaintiffs caused said radio station to be constructed at said Rosarito Beach in conformity with said concession, and that the first time said defendants sought specific performance of said contract of March 30, 1936, or asserted the right to recover damages for the alleged breach of said contract by plaintiffs, or asserted the right to any relief under said contract other than that claimed in the original and in the amended complaints filed in said action No. 8108-H was on or about March 25, 1940, and through the medium of the answer and counterclaim filed by them herein; and [83]

It further appearing that in the construction of said radio station said plaintiffs reasonably expended the sum of \$144,697.88, that said last-mentioned amount included the sum of \$90,000 expended by said M. P. Barbachano out of his own

funds, that whereas he originally had received the entire capital stock of said Radio Difusora Internacional he had been compelled to and did relinquish 80% of said stock in order to obtain the additional sum of \$50,000 required to complete the construction of said radio station; and

It further appearing that on September 10, 1937, a certain action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, entitled John A. Murphy v. International Broadcasting System, et al., wherein the plaintiffs herein and the defendants Dexter and Lawrence W. Allen were also named as defendants, that in said Superior Court action one R. E. Allen was appointed receiver of the property therein described, including property being assembled for use in the construction of said radio station, that thereafter and on or about October 5, 1937, said Lawrence W. Allen, as plaintiff in said action No. 8108-H consented that the property theretofore attached pursuant to the writ of attachment issued therein be surrendered to said R. E. Allen as receiver, that thereafter and on or about October 27, 1937, said receiver caused to be filed in this court a certain civil action designated as No. 8158-Y, wherein the Marshal of this Court, also the plaintiffs herein, as well as others, were named as defendants, that in the complaint filed in said action No. 8158-Y it was alleged, among other matters, that said Marshal had refused to surrender said attached property to said receiver, and also alleged that the defendants in said action

No. 8158-Y excepting a certain surety [84] company, had conspired to convert said attached property and to transport the same to said Rosarito Beach, also alleged that said attached property had a reasonable value of \$30,000, that the reasonable expense incurred and to be incurred in recovering said property and conducting an investigation to recover the same amounted to the sum of \$1,000, also that the reasonable value of the use of said attached property amounted to \$100.00 per day, and praying judgment for the return of said attached property or its value plus \$1,000 expense, plus \$100.00 per day from October 5, 1937, plus \$10,000 exemplary damages, that thereafter and on April 20, 1938, judgment was entered in said action No. 8158-Y decreeing the dismissal thereof for lack of jurisdiction in this court of the subject matter thereof; and

It further appearing that said defendants and each of them have failed to perform the terms and conditions on their part to be performed under said contract of March 30, 1936, or any part thereof, except as hereinbefore recited; and

It further appearing that from time to time from and after October 5, 1936, and until the issuance of an injunction pendente lite herein restrained such acts, said defendants have notified various persons, including officials of the Mexican government, that they were the owners of said concession and of said radio station, also notified such persons that said plaintiffs were not the owners thereof but merely held possession of the same in fraud of the



rights of said defendants, that likewise during said period and until thus restrained said defendants from time to time threatened to sue anyone doing business with said plaintiffs with respect to said radio station, also to attach any amounts which might become owing to said Radio Difusora Internacional from [85] California advertisers using radio time on said station, and that by reason of said statements, threats and acts of said defendants said Radio Difusora Internacional has been and still is unable to commence normal commercial operations of said station; and

It further appearing that said plaintiffs M. P. Barbachano and Border Electric and Telephone Co., Inc., entered into said contract of March 30, 1936, and continued to deal with said defendants under said contract until the early part of October, 1936, in the belief of the truth of the aforementioned representations made by said defendants and in reliance thereon, and that said plaintiffs would not have entered into said contract and would not have continued to deal with said defendants thereunder, but for said representations; and

It further appearing that if said defendants had performed the terms and conditions of said contract, of March 30, 1936, on their part to be performed, they would have commenced the construction of said radio station, within 30 days after the date, to wit, September 19, 1936, on which said concession had been granted, and would have completed the construction of said station, and would have had the same on the air and operating within 120

days thereafter, to wit, on or before January 17, 1937, that thereby and under the terms of said contract said plaintiffs M. P. Barbachano and Border Electric and Telephone Co., Inc., would have become entitled, without cost to themselves, for the broadcast of the activities of said Rosarito Beach for the purpose of advertising said resort and its activities to thirty minutes in the morning, thirty minutes at noon, [86] thirty minutes at 6 p.m. and thirty minutes at midnight every day for a period of five years from March 30, 1936, less the time required to obtain said concession and to complete the construction of said radio station, that said last-named plaintiffs have been deprived of such free broadcasts by the acts and conduct of said defendants, and that the value of such free broadcasts has been at the rate of \$300 per month from and after January 17, 1937; and

It further appearing that if said defendants had performed the terms and conditions of said contract of March 30, 1936, on their part to be performed, and had expended for the construction of said radio station an amount comparable to that expended for the construction thereof, to wit, the sum of \$144,697.88, which sum represents the reasonable cost thereof, then said plaintiffs M. P. Barbachano and Border Electric and Telephone Company, Inc., would have become entitled to purchase 20% of the capital stock of the corporation which under the terms of said radio contract was to acquire said radio station and the concession for the same at an amount equal to 20% of said cost,



to wit, the sum of \$28,939.58, whereas instead of said last named plaintiffs were compelled to and did invest the sum of \$90,000 in the purchase of 20% of the capital stock of the corporation which has acquired said radio station and concession, and thereby said last-named plaintiffs have sustained a loss in the additional sum of \$61,060.42; and

It further appearing that by reason of the aforementioned acts and conduct of said defendants, said last-named plaintiffs have also sustained a loss in the additional sum of \$10,000 expended by the latter, as aforementioned, in order to procure the reinstatement of said concession [87] after the Mexican government had declared the same to have become void and terminated; and

It further appearing that, except as herein otherwise found, each and all of the material allegations of the defendants' answer and amended counterclaim are untrue;

The Court Concludes that plaintiffs are entitled to injunctive relief against said defendants, in conformity with that granted in the injunction pendente lite heretofore issued herein, together with costs;

The Court Further Concludes that said plaintiffs M. P. Barbachano and Border Electric and Telephone Co., Inc., are entitled to damages against said defendants in the respective amounts hereinbefore outlined;

The Court Further Concludes that said defendants are entitled to no relief herein.

[Endorsed]: Filed September 17, 1941.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for pre-trial hearing on April 10, 1941, and April 30, 1941, and thereafter for trial on June 5, 6, 10, 11, 12, 13, 16 and 17, 1941, before the above-entitled Court, the Honorable Harry A. Hollzer, Judge, presiding, Hardy & Horwin by Leonard Horwin appearing as attorneys for plaintiffs and E. Marion Crawford and Lawrence W. Allen appearing as attorneys for defendants, and oral and documentary evidence having been introduced on behalf of both parties, and plaintiffs having thereafter filed opening and reply briefs and defendants having filed their answering brief, and the court having considered the foregoing and heard the oral arguments of counsel for both parties, and being fully advised, makes the following:

### Findings of Fact

#### I.

The allegations contained in Paragraphs I, [89] II and III of Plaintiffs' Amended Complaint are true.

#### II.

The allegations contained in Paragraph IV of Plaintiffs' Amended Complaint are true, excepting only that the fact is that defendant Cinema Advertising Agency was and is a fictitious firm name

under which defendants Lawrence W. Allen, Willis Allen and M. F. Dexter at all times herein involved did business.

### III.

The allegations contained in Paragraph VI of Plaintiffs' Amended Complaint are true, the facts being that as to the transactions having to do with the making of the contract mentioned in Plaintiffs' Amended Complaint and incorporated therein as Exhibit "A," and what any of the defendants did with reference to said contract at the time it was made and subsequent thereto, each of the defendants was bound by the acts of any of the others.

### IV.

The allegations contained in Paragraph VII of Plaintiffs' Amended Complaint are true, excepting only that the fact is that the contract annexed thereto as Exhibit "A" was between plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., and defendants Lawrence W. Allen, Willis Allen and M. F. Dexter, said contract having been signed on behalf of defendants under the name of Cinema Advertising Agency by said Lawrence W. Allen; that it was provided in the modification of said contract that the concession mentioned in said contract might be obtained in the name of said M. P. Barbachano and thereafter transferred by him to the corporation mentioned in Paragraph 9 of said contract.

### V.

The allegations contained in Paragraph [90]

VIII of Plaintiffs' Amended Complaint are true, excepting only that the fact is that defendants represented to plaintiffs before and after the making of the contract mentioned in Paragraph VII of Plaintiffs' Amended Complaint, and plaintiffs in reliance upon said representations at all times until on or about October 5, 1936, believed that it would cost said defendants not less than \$90,000 to construct said radio station; that at the time of making said representations said defendants believed but did not disclose to plaintiffs that the actual purpose and intention of defendants was to expend not to exceed \$30,000 in the construction of said radio station.

#### VI.

The allegations contained in Paragraph IX of Plaintiffs' Amended Complaint are true, excepting only that the fact is that the Mexican Government delivered said concession to a representative of plaintiff M. P. Barachano at Mexico City on September 19, 1936; that said M. P. Barbachano received said concession at Tia Juana, Mexico, on or about September 24, 1936.

#### VII.

The allegations contained in Paragraph X of Plaintiffs' Amended Complaint are true.

#### VIII.

The allegations contained in Paragraph XI of Plaintiffs' Amended Complaint are true, the facts being that in addition to procuring the concession



for radio station and providing the suitable lands, buildings and electrical power facilities therefor and otherwise performing the terms and conditions of the contract annexed to Plaintiffs' Amended Complaint as Exhibit "A," plaintiffs caused radio station XEAQ at Rosarito Beach, Mexico, to be removed on or about July 19, 1936, in order to enable defendants to use the site thereof for [91] construction of the new radio station, pursuant to said contract.

### IX.

The allegations of Paragraph XII of Plaintiffs' Amended Complaint are true, the facts being that under the laws of the Republic of Mexico said concession for radio station, although bearing date of August 31, 1936, was not effective until the date of its delivery to the concessionaire, to wit, September 19, 1936, and under the terms and conditions of said concession and the laws of said Republic said concession would have become void in the event of failure to deposit eleven thousand pesos or bond in that amount with the Mexican Government within fifteen days after the effective date of said concession, that is, on or before October 5, 1936.

### X.

The allegations of Paragraph XIII of Plaintiffs' Amended Complaint are true, the facts being that on the date said M. P. Barbachano received said concession at Tia Juana, Mexico, to wit, on or about September 24, 1936, he informed defendants by telephone of the issuance and receipt of said

concession; that on the following day, to wit, September 25, 1936, he permitted said defendants to inspect the original concession and furnished them with typewritten copy and English translation thereof; that at the same time said M. P. Barbachano made demand upon said defendants that they furnish eleven thousand pesos or bond in that amount for deposit with the Mexican Government on or before October 5, 1936, as required by the terms and conditions of said concession and the laws of Mexico; that thereafter and up until on or about October 5, 1936, said M. P. Barbachano repeated said demand upon defendants.

# XI.

The allegations of Paragraph XIV of Plaintiffs' Amended Complaint are true, the facts being [92] that at no time involved herein did said defendants, or any of them, furnish or tender or show any evidence of ability to furnish eleven thousand pesos or bond in that amount as required for deposit with the Mexican Government under the terms and conditions of said concession, or furnish or tender, or show any evidence of ability to construct, nor did they construct the radio station as provided in the contract annexed to Plaintiffs' Amended Complaint as Exhibit "A," or furnish or tender or show any evidence of ability to furnish the assets required by the laws of Mexico for minimum paid-up capitalization of the corporation mentioned in Paragraph 9 of said contract; that at no time involved herein were said defendants or any of them able to pay for or arrange for the construc-



tion or equipment or installation of said radio station, or to deposit said eleven thousand pesos or bond in that amount or to furnish said minimum paid-up capitalization of said corporation.

## XII.

The allegations of Paragraphs XV, XVI, XVII and XVIII of Plaintiffs' Amended Complaint are true, excepting only that the bond furnished by plaintiffs as alleged in Paragraph XVII of Plaintiffs' Amended Complaint was in the sum of 11,000 pesos.

## XIII.

The allegations of Paragraph XIX of Plaintiffs' Amended Complaint are true, excepting only that the total cost to plaintiffs of construction of said radio station was \$144,697.88, which sum was at all times and is the reasonable cost of construction of said radio station.

## XIV.

The allegations of Paragraph XX of Plaintiffs' Amended Complaint are true. [93]

## XV.

The allegations of Paragraph XXI of Plaintiffs' Amended Complaint are true, the facts being that from time to time from and after October 5, 1936, and until the issuance of an injunction pendente lite herein restraining such acts, said defendants have notified various persons mentioned in said paragraph, including officials of the Mexican Government and others, that said defendants were the owners of said concession and said radio station and

also notified such persons that said plaintiffs were not the owners thereof but merely held possession of the same in fraud of the rights of said defendants; that likewise during said period and until thus restrained said defendants from time to time threatened to sue anyone doing business with said plaintiffs with respect to said radio station and also to attach any amounts which might become owing to said Radio Difusora Internacional S. A. from California advertisers using radio time on said station; that by reason of said statements, threats and acts of said defendants said Radio Difusora Internacional S. A. has been and still is unable to commence normal commercial operations of said radio station.

That said defendants on or about September 3, 1937, caused to be filed in this court that certain civil action numbered 8108-H wherein said Lawrence W. Allen was named as plaintiff and the plaintiffs herein were named as defendants; that the alleged cause of action pleaded in the complaint filed in said action was one seeking the recovery of \$2,041.00 alleged to have been received at sundry times between August 18, 1936 and September 30, 1936 by the within named plaintiffs from defendant M. F. Dexter doing business under the name of Cinema Advertising Agency; that in said action numbered 8108-H, within named defendants on September 3, 1941, caused a writ of attachment to be levied upon various materials, supplies, equipment and apparatus then being manufactured and assembled and all of which were needed for the construction, equipment and installation of said radio station

to be built at Rosarito Beach, Mexico; that by reason of such attachment the plaintiffs herein were prevented from completing the construction, equipment and installation of said station within the time required by said concession and the laws of Mexico; that because of such delay the Mexican Government declared said concession terminated and void; that as a consequence said M. P. Barbachano acting on behalf of the plaintiffs was compelled to and did take steps and expend monies in the additional amount of \$10,000 in order to procure the reinstatement of said concession; that on September 10, 1937, a certain action was filed in the Superior Court of the State of California, in and for the County of Los Angeles, entitled John A. Murphy vs. International Broadcasting System, et al., wherein the plaintiffs herein and the defendants M. F. Dexter and Lawrence W. Allen were also named as defendants; that in said Superior Court action one R. E. Allen was appointed receiver of the property therein described which included said property being assembled for use in the construction of said radio station; that thereafter and on or about October 5, 1937, said Lawrence W. Allen as plaintiff in said action numbered 8108-H consented that the property theretofore attached pursuant to the writ of attachment issued therein be surrendered to said R. E. Allen as Receiver; that thereafter and on or about October 27, 1937, said Receiver caused to be filed in this court a certain civil action designated 8158-Y, wherein the Marshal of this court, also the plaintiffs herein, as well as others, were named as defendants;

that in the complaint filed in said action 8158-Y, it was alleged, among other matters, that said Marshal had refused to surrender said attached property to said Receiver and also alleged that the defendants in said action 8158-Y, excepting a certain surety company, had conspired to convert said attached property and to transport the same to said Rosarito Beach, Mexico; that said attached property had a reasonable value of \$30,000, that the reasonable expense incurred and to be incurred in recovering said property and conducting an investigation to recover the same amounted to the sum of \$1,000, that the reasonable value of the use of said attached property amounted to \$100 per day, and prayed judgment for the return of said attached property or its value plus \$1,000, plus \$100 a day from October 5, 1937, plus \$10,000 exemplary damages; that thereafter and on April 20, 1938, the court in said action 8158-Y held said action 8108-H and the attachment founded thereon to have been void from the beginning for lack of jurisdictional amount sought in plaintiffs' complaint therein, and accordingly the court on April 20, 1938, entered judgment in said action 8158-Y, decreeing the dismissal thereof for lack of jurisdiction in this court of the subject matter thereof.

#### XVI.

The allegations of Paragraph XXII of Plaintiffs' Amended Complaint are true.

#### XVII.

The allegations of Paragraph XXIII of Plain-



tiffs' Amended Complaint are true, excepting only that the facts are that the damage which plaintiffs incurred as a direct result of the conduct of defendants set forth in Plaintiffs' Amended Complaint and hereinabove in these Findings was and is as follows, to-wit, that said plaintiffs sustained loss in the amount of \$10,000 expended by plaintiff as aforementioned in order to procure the reinstatement of said concession after the Mexican Government had declared the same to have become void and terminated; that, in addition, plaintiffs sustained loss in the sum of \$61,060.42, in that if said defendants had performed the terms and conditions of said contract, incorporated in Plaintiffs' Amended Complaint as Exhibit "A," on their part to be performed and had expended for the construction of said radio station an amount comparable to the amount actually expended for the construction thereof by plaintiffs, to-wit, the sum of \$144,697.88, which sum represents the reasonable cost thereof, the said plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., would have become entitled to purchase twenty per cent of the capital stock of the corporation, which under the terms of said contract was to acquire said radio station and the concession therefor, at an amount equal to twenty per cent of said cost, or \$28,939.58; whereas, instead said last named plaintiffs were compelled to and did invest the sum of \$90,000 in the purchase of twenty per cent of the capital stock of the corporation which has acquired said radio station and concession, or a net loss of \$61,060.42; that, in addition, plaintiffs

have been damaged in the sum of \$15,150, in that if said defendants had performed the terms and conditions of said contract on their part to be performed, they would have commenced the construction of said radio station within thirty days after the date, to wit, September 19, 1936, on which said concession was granted; and would have completed the construction of said radio station and would have had same on the air and operating within 120 days thereafter, to-wit, on or before January 17, 1937; and thereby and under the terms of said contract said plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., would have become entitled without cost to themselves to the broadcast of the activities of said Rosarito Beach, Mexico, for the purpose of advertising the resort thereat owned by said plaintiffs together with its activities, thirty minutes in the morning, thirty minutes at noon, thirty minutes at six p.m., and thirty minutes at midnight, every day for a period of five years from March 30, 1936, less the time required to obtain said concession and to complete construction of said radio station; that said last named plaintiffs have been deprived of such free broadcasts by the acts and conduct of said defendants and that the value of such free broadcasts has been at the rate of \$300 per month from and after January 17, 1937, to and including the end of said five year period, to wit, March 30, 1941, or a total damage of \$15,150.



## XVIII.

The allegations of Paragraphs XXIV, XXV and XXVI of Plaintiffs' Amended Complaint are true.

## XIX.

The allegations of Paragraphs I and III of the second cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action in Plaintiffs' Amended Complaint incorporated in said second cause of action by reference, are true with the qualifications hereinabove in these Findings stated.

## XX.

The allegations of Paragraph II of the second cause of action in Plaintiffs' Amended Complaint are true.

## XXI.

The allegations of Paragraph I of the third cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action of Plaintiffs' Amended Complaint incorporated in said third cause of action by reference, are true with the qualifications hereinabove in these Findings stated.

## XXII.

The allegations of Paragraph II of the third cause of action in Plaintiffs' Amended Complaint are true, the facts being that at all times involved herein, a radio station is deemed under Mexican law to include the lands and the building wherein and whereon the same is situated; that likewise under

Mexican law no alien or his nominee may use or own or be a stockholder in a Mexican corporation using or owning land in Mexico situated within 100 kilometers from any of its borders or within 50 kilometers from any of its shores; that said Rosarito Beach, Mexico, where said radio station was required to be erected under the terms of said contract, incorporated in Plaintiffs' Amended Complaint as Exhibit "A," was located at all times involved herein less than 100 kilometers south of the Mexican Border adjoining the United States, and less than 50 kilometers from the Pacific shore line of Mexico.

### XXIII.

The allegations of Paragraphs III, IV and VI of the third cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action in Plaintiffs' Amended Complaint incorporated in said third cause of action by reference are true with the qualifications hereinabove in these Findings stated.

### XXIV.

The allegations of Paragraph V of Plaintiffs' Amended Complaint are true, excepting only that the total cost to plaintiffs for the construction of said radio station as set forth in said paragraph was and is \$144,697.88, which sum was and is the reasonable cost of construction of said radio station.

### XXV.

The allegations of Paragraph VII of the third cause of action of Plaintiffs' Amended Complaint

are true, the facts being that plaintiffs were damaged as a direct result of defendants' conduct in the amounts set forth in Paragraph XVII of these Findings.

#### XXVI.

The allegations of Paragraph VIII of the third cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said third cause of action by reference are true with the qualifications hereinabove in these Findings stated.

#### XXVII.

The allegations of Paragraph I of the fourth cause of action in Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said fourth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

#### XXVIII.

The allegations of Paragraph II of the fourth cause of action in Plaintiffs' Amended Complaint are true, excepting only that the fact is that the total cost to plaintiffs for the construction of the radio station mentioned in said paragraph was \$144,697.88, which sum was and is the reasonable cost of said construction.

#### XXIX.

The allegations of Paragraph III of the fourth cause of action in Plaintiffs' Amended Complaint are true.

XXX.

The allegations of Paragraph IV of the fourth cause of action of Plaintiffs' Amended Complaint are true, the facts being that on February 19, 1940, a law enacted by the Congress of Mexico went into effect prohibiting the ownership of a Mexican Radio Station by an alien or by a corporation having an alien stockholder and said law further provided and provides that such ownership would constitute ground for cancelling any radio station held by an alien or by such corporation.

XXXI.

The allegations of Paragraph V of the fourth cause of action of Plaintiffs' Amended Complaint are true. [100]

XXXII.

The allegations of Paragraph VI of the fourth cause of action of Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said fourth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

XXXIII.

The allegations of Paragraph I of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, excepting only that the allegations of the first cause of action incorporated in said fifth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

## XXXIV.

The allegations of Paragraph II of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, the facts being that during the negotiations leading up to the execution of the contract incorporated in Plaintiffs' Amended Complaint by reference as Exhibit "A," also at the time of entering into the same, and from time to time thereafter up until the early part of October, 1936, said defendants repeatedly represented to the said plaintiffs that they were financially able and ready to pay the cost of procuring the radio concession from the Mexican Government mentioned in said contract, also to provide all deposits or equivalent bonds required in connection with such concession, and also to pay the cost of constructing, erecting and installing the radio station described in said contract, including all drawings, blue prints, plans, specifications, equipment and parts for the same; that from time to time subsequent to the execution of said contract and until on or about the early part of October, 1936, while plaintiffs were engaged in good faith in conducting negotiations with the Mexican government for the purpose of obtaining said concession, said defendants for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract and for the purpose of inducing said plaintiffs to believe that said defendants were financially able and ready to do the things hereinabove mentioned, represented to said plaintiffs that said radio station to be constructed by said defendants as



aforesaid would cost when completed not less than the sum of \$90,000; that during said last mentioned period and for the same purposes said defendants from time to time represented to said plaintiffs that they had sufficient assets on hand to enable them to meet said financial requirements and further represented to said plaintiffs that they had expended the sum of \$30,000 on account of \$90,000 total purchase price for the equipment for said radio station, and further represented to said plaintiffs that the sum of \$1700, which defendants caused to be remitted to plaintiffs on or about August 18, 1936, had been obtained by said defendants by the sale of government bonds allegedly owned by them; that on several occasions, particularly during September, 1936, for the purpose of inducing said plaintiffs to continue to deal with them in accordance with the terms of said contract and for the purpose of inducing said plaintiffs to believe that said defendants were financially able and ready to do the things required of them by said contract as hereinabove mentioned, said defendants represented to said plaintiffs that they had entered into a written contract with Federal Radio & Television Company for the construction equipment and installation of the radio station required to be built by said defendants under the terms of said contract of March 30, 1936, and further represented that the cost thereof would amount to the sum of \$90,000, and that said defendants expended an amount of \$30,000 on account of the purchase of the equipment for said station, and further represented that they were able to complete the



construction of said station within the time and in accordance with the conditions required by said contract.

### XXXV.

The allegations of Paragraph III of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, the facts being that at all times mentioned herein, up until the early part of October, 1936, said plaintiffs believed the representations set for in Paragraph XXXIV of these Findings and relied upon the same and in the absence of said representations would not have entered into the said contract of March 30, 1936, and were induced to and did act thereon and continued to treat said contract as being in full force and effect and to perform their obligations thereunder in reliance upon said representations until the early part of October, 1936.

### XXXVI.

The allegations of Paragraph IV of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, the facts being that at no time involved herein did said defendants or any of them have funds or assets or other means to meet the financial requirements of said contract or any substantial portion thereof; that at no time involved herein were said defendants or any of them financially able or ready, either wholly or in part, in any substantial degree to pay the cost of procuring said radio concession or to provide the deposits or equivalent bonds required in connection with said con-

cession, or to pay the cost of constructing, erecting and installing said radio station; that at all times involved herein said defendants were insolvent and judgments totaling several thousand dollars were outstanding and unpaid against each of the defendants Lawrence W. Allen and Willis Allen; that said defendants did not nor did any of them pay the sum of \$30,000 or any other sum on account of equipment for said radio station; that the sum of \$1700 mentioned in Paragraph XXXIV of these Findings was not obtained by said defendants [103] by the sale of government bonds, or any bonds or property owned by said defendants, but instead was obtained by them from a party who borrowed said sum in varying amounts from various members of the public interested in securing legislation establishing old age pensions; that it was the purpose and intention of said defendants to endeavor to raise funds required to obtain and maintain said radio station and to construct, equip and install said radio station through the sale of stock in the Mexican corporation proposed to be organized under the terms of said contract and to which corporation it was contemplated that plaintiff M. P. Barbachano would transfer said concession after the same had been issued to him by the Mexican Government; that it was the purpose and intention of said defendants to expend not to exceed the sum of \$30,000 in all, if they could procure the same, for the construction, equipment and installation of said radio station, and for the fees, deposits and bonds required in connection therein, therewith and for the conces-

sion pertaining to the same; and said defendants at all times up to the early part of October, 1936, concealed the above-mentioned facts from the plaintiffs; that likewise in the opinion of the Engineer whom said defendants consulted with respect to the preparation, plans and specifications for the construction of said radio station, said sum of \$30,000 would not have been sufficient to pay the cost of radio and antenna, the separate structure required for housing the transmitter, the wages of the workmen needed to construct and install the same, and the required deposits and fees, in addition to the cost of constructing, equipping and installing said station.

That said defendants did not nor did any of them enter into a contract with said Federal Radio and Television Company of the character as set forth in Paragraph XXXIV of these Findings or expend the sum of \$30,000 or any other amount towards the purchase of the equipment for such station; that on the contrary, under date of September 28, 1936, said defendants through said Lawrence W. Allen entered into a written contract with one G. W. Berger, then doing business under the name of Federal Radio and Television Company, under the terms of which contract, said Berger, in consideration of \$335 to be paid him by said defendants, was to prepare and furnish the said defendants schematic drawings, together with blue prints thereof, showing everything necessary, convenient and customary for the construction of said radio station at Rosarito Beach, Mexico, as per said concession, also to prepare and furnish to said defendants complete plans and speci-

fications for the construction, erection, installation and operation of said station, also to furnish completed and detailed estimates of the net cost of all parts, material, labor and other expenses necessary for the construction, erection, installation and equipment of said station; that likewise under the terms of said contract with Berger, it was provided that within a period of not exceeding sixty days after delivery of the aforementioned documents, said defendants were entitled to avail themselves of his services for the construction, erection and installation of said radio station at the compensation of \$75.00 per week for a minimum period of ten weeks and a maximum period of twelve weeks, \$665 to be paid ten days after approval by the Mexican Government of the complete installation of said station; that it was recited in said contract with Berger that he was rendering his services at reduced figures for the purpose of establishing his reputation for the construction of high-powered radio stations, and that the reasonable market value of the services, labor, equipment and parts to be represented by said station when complete would be not less than \$90,000; that it was recited in said contract with **Berger that** when said station had been completed and all payments mentioned in said contract had been made said Berger would furnish to said defendants if requested a receipted bill of sale for said labor, parts and material or completed equipment, showing payment of the sum of \$90,000; that it was recited in said contract with Berger that in the construction, erection and installation of said equipment and sta-



tion he would obtain all possible discounts in the purchase of parts and equipment and that he would construct said station in accordance with the highest and most advanced and accomplished practice; that in spite of the recitals and representations in said contract to the contrary, it was understood at all times between him and said defendants that said defendants would expend not to exceed the sum of \$30,000 for the drawings, blue prints, plans and specifications and for the construction, erection and installation of said radio station, including all equipment and parts for the same and for the cash or other deposits required in connection with procurement and maintenance of radio concession therefor.

That it was understood and contemplated by the parties to said contract incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," that the formation and organization of the corporation to be created under the laws of Mexico as mentioned in said contract would not be commenced until said radio concession had been issued to said M. P. Barbachano; that the fact was that under Mexican law it would take from fifty to seventy-five days to form and organize such corporation and to obtain from the appropriate Mexican officials authorization to transfer said concession to such corporation; that likewise under Mexican law it would be necessary that 25,000 pesos, equivalent to about \$7,000, be provided as paid up capital of such corporation as a condition precedent to the formation and capitalization thereof; that at no times involved herein were said defendants or any of them able to furnish said \$7,000.

XXXVII.

The allegations of Paragraphs V of the fifth cause of action added by amendment to Plaintiffs' Amended Complaint are true, excepting only that the allegations of the [106] first cause of action incorporated in said fifth cause of action by reference are true with the qualifications hereinabove in these Findings stated.

XXXVIII.

None of the allegations of Paragraphs I and II of Defendants' Amended Answer are true.

XXXIX.

None of the allegations of Paragraph III of Defendants' Amended Answer are true, excepting only that so much of the allegations thereof are true as admit the allegations of Paragraphs VII, VIII and XXI of Plaintiffs' Amended Complaint.

XL.

None of the allegations of Paragraph IV of Defendants' Amended Answer are true, excepting only so much thereof as incorporates by reference portions of Defendants' Amended Answer hereinabove in these Findings found to be true.

XLI.

None of the allegations of Paragraph V of Defendants' Amended Answer are true, excepting only so much thereof as incorporates by reference portions of paragraphs of the Amended Answer hereinabove in these Findings found to be true, and so



much thereof as admits the allegations of Paragraph IX of Plaintiffs' Amended Complaint.

#### XLII.

None of the allegations of Paragraph VI of Defendants' Amended Answer are true, excepting only so much thereof as incorporates by reference portions of paragraphs of Defendants' Amended Answer hereinabove in these Findings found to be true.

#### XLIII.

None of the allegations of Paragraph VII, VIII, IX and X of Defendants' Amended Answer are true, excepting only that it is true that on or about October 5, 1936, plaintiffs caused to be served on defendants the written notice of rescission in evidence as defendants' Exhibit "A"; that it is likewise true that plaintiffs constructed the radio station at Rosarito Beach themselves at their own expense.

#### XLIV.

None of the allegations of Paragraph I of Defendants' Amended Counter-Claim are true, excepting only that it is true that The Border Electric and Telephone Co., Inc., and Radio Difusora Internacional, S. A., at all times involved herein were and are Mexican corporations; that defendants at all times involved herein were and are citizens and residents of the State of California in this judicial district and division; that a certificate of fictitious firm name for defendant Cinema Advertising Agency has been filed with the County Clerk for the County of Los Angeles, State of California.

## XLV.

None of the allegations of Paragraph II of Defendants' Amended Counter-Claim are true, excepting that it is true that the contract dated March 30, 1936, incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," was entered into between plaintiffs M. P. Barbachano and The Border Electric and Telephone Co., Inc., and defendants Cinema Advertising Agency, Lawrence W. Allen, Willis Allen and M. F. Dexter, and it is true that said contract included the provisions mentioned in said paragraph.

## XLVI.

None of the allegations of Paragraph III of Defendants' Amended Counter-Claim are true, excepting only that it is true that the concession mentioned therein contained the provisions set forth in said paragraph, not including, however, the date of issuance set forth in said paragraph, said date of issuance having been as found in Paragraph IX of these Findings; that on or about August 18, 1936, defendants caused to be sent to plaintiffs \$1700 covering costs and fees incident to procurement of said concession, the fact being, however, that said sum of \$1700 was not obtained by said defendants out of their funds as represented by them but instead was obtained by them from a party who borrowed said sum in various amounts from various members of the public interested in securing legislation establishing old age pensions; that after issuance of said concession defendants demanded that plaintiffs turn over the concession, the facts being,

however, that prior to October, 1936, and again in the early part of October, 1936, defendants demanded that plaintiffs turn the concession over to defendants, that plaintiffs refused to turn over the concession as demanded by the defendants; that plaintiffs demanded that defendants furnish a bond in the sum of \$90,000 guaranteeing completion of the construction, equipment and installation of said radio station; that at the time of making said demand plaintiffs had discovered and the fact was that defendants had not contracted for the construction of the radio station as represented to plaintiffs by defendants; that defendants were insolvent and unable to complete said construction and that neither then nor at any other time had defendants or any of them paid any part of the purchase price of said radio station to anyone, and plaintiffs made said demand upon defendants to furnish said \$90,000 after defendants had failed to furnish said eleven thousand pesos or equalivent bond as required by said concession and laws of Mexico applicable thereto.

#### XLVII.

None of the allegations of Paragraphs IV, V, VI, VII, VIII, IX, X and XI of Defendants' Amended Counter-Claim are true, excepting only that it is true as alleged in Paragraph IV thereof that said concession required deposit of a bond in the sum of 11,000 pesos with the Mexican Government within fifteen days from date of issuance thereof. [109]

#### XLVIII.

The allegations of Paragraph I of Plaintiffs'

Reply to Defendants' Amended Counter-Claim are true.

#### XLIX.

The allegations of Paragraph II of Plaintiffs' Reply to Defendants' Amended Counter Claim are true, excepting only that the parties to said contract of March 30, 1936, incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," were as set forth in Paragraph IV of these Findings.

#### L.

The allegations of Paragraphs III, IV, V, VI and VII of Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, excepting only that the bond required by said concession to be deposited with the Mexican Government, as mentioned in Paragraph IV of said Reply, was in the sum of 11,000 pesos.

#### LI.

The allegations of Paragraph I of the second affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, the facts being that on or about September 3, 1937, defendants caused to be filed in this court a certain civil action designated as 8108-H, wherein said Lawrence W. Allen was named as plaintiff and the plaintiffs herein were named as defendants; that the alleged cause of action pleaded in the complaint filed in said action was one seeking the recovery of \$2,041 alleged to have been received at sundry times between August 18, 1936, and September 30, 1936, by the within named plaintiffs from defendant M. F.



Dexter, doing business under the name of Cinema Advertising Agency; that by said action and by express written election contained in pleadings of said Lawrence W. Allen in said action the defendants herein elected to treat said contract of March 30, 1936, incorporated by reference in Plaintiffs' Amended Complaint as Exhibit "A," as having been rescinded and to recover the monies allegedly advanced by them as aforesaid to said plaintiffs in the amount of \$1700, plus the further sum of \$3350 paid by them to said Berger under the terms of their contract with said Berger, dated September 28, 1936, hereinabove in Paragraph XXXVI of these Findings described.

#### LII.

The allegations of Paragraph II of the second affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, excepting only that the cost of construction of said radio station to plaintiffs was \$144,697.88, which sum was and is the reasonable cost of construction of said radio station.

#### LIII.

The allegations of Paragraph III of the second affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true.

#### LIV.

The allegations of Paragraph I, II, III and IV of the third affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true.

LV.

The allegations of Paragraphs I, II, III and IV of the fourth affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true.

LVI.

The allegations of Paragraph I of the fifth affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, the facts being as stated in Paragraph XXX of these Findings.

LVII.

The allegations of Paragraph I of the sixth affirmative defense in Plaintiffs' reply to Defendants' Amended Counter-Claim are true, excepting only that the allegations of Plaintiffs' first cause of action incorporated by reference in said sixth affirmative defense are true with the qualifications hereinabove in these Findings stated.

LVIII.

The allegations of Paragraph II of the sixth affirmative defense in Plaintiffs' Reply to Defendants' Amended Counter-Claim are true, the facts being that, in addition to the facts set forth under Paragraph LVII of these Findings, said Plaintiffs caused said radio station to be constructed at said Rosarito Beach in conformity with said contract of March 30, 1936; that the first time said defendants sought specific performance of said contract or asserted the right to recover damages for the alleged breach of said contract by said plaintiffs or asserted



the right to any relief under said contract other than that claimed in said action 8108-H, was on or about March 25, 1940, and through the medium of the Answer and Counter-Claim filed by them herein; that in the construction of said radio station said plaintiffs reasonably expended the sum of \$144,-697.88.

#### XLIX.

The allegations of Paragraphs I and V of the seventh affirmative defense added by Plaintiffs' Amendment to their Reply to Defendants' Amended Counter-Claim are true, excepting only that the allegations of Plaintiffs' first cause of action incorporated in said seventh affirmative defense by reference are true with the qualifications hereinabove in these Findings stated.

#### LX.

The allegations of Paragraphs II, III and IV of the seventh affirmative defense added by Plaintiffs' Amendment to their Reply to Defendants' Amended Counter-Claim are true. [112]

#### LXI.

Excepting as otherwise hereinabove specifically set forth all of the allegations of Plaintiffs' Amended Complaint and Reply to Defendants' Amended Counter-Claim are true, and none of the allegations or denials of Defendants' Amended Answer or Amended Counter-Claim are true.

#### Conclusions of Law

From the foregoing facts the Court makes the following Conclusions of Law.

I.

Plaintiffs are entitled to judgment against defendants in the amount of \$86,210.42.

II.

Plaintiffs are entitled to injunctive relief against the defendants and each of them in conformity with that granted in the injunction pendente lite heretofore issued herein, together with their costs.

III.

Plaintiffs are entitled to judgment decreeing that none of the defendants are entitled to any relief against any of the plaintiffs and that none of the defendants are entitled to any interest in any of the plaintiffs.

IV.

Plaintiffs are entitled to judgment releasing plaintiffs' surety from liability under the surety bond posted by plaintiffs herein as security in accordance with the injunction pendente lite herein.

Dated: October 17, 1941.

/s/ H. A. HOLLZER,  
Judge.

[Endorsed]: Filed October 18, 1941.

In the United States District Court, Southern  
District of California, Central Division  
No. 827-H

M. P. BARBACHANO, et al.,

Plaintiffs,

vs.

LAWRENCE W. ALLEN, et al.,

Defendants.

### JUDGMENT

The above-entitled cause came on regularly for trial on June 5, 6, 10, 11, 12, 13, 16 and 17, 1941, in the above-entitled Court before the Honorable Harry A. Hollzer, Judge Presiding, Hardy & Horwin by Leonard Horwin appearing at attorneys for plaintiffs and E. Marion Crawford and Lawrence W. Allen appearing at attorneys for defendants, and evidence both oral and documentary having been introduced and the parties having filed their Briefs and made oral argument following trial, and the cause having been submitted for decision and the Court having heretofore made and caused to be filed its written Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that:

1. Plaintiffs recover from defendants Cinema Advertising Agency, Lawrence W. Allen, Willis Allen and M. F. Dexter the sum of \$86,210.42, together with costs amounting to \$343.99; [114]

2. That each of the defendants herein, their principals, servants and employees or other persons associated with them be and they are hereby permanently enjoined from making, publishing, communicating or causing to be made, published or communicated to any person or persons statements to the effect that defendants or any of them or any person or persons acting on their behalf are the owners of the concession for radio station XERB at Rosarito Beach, Mexico, or radio station XERB or of the buildings, equipment or other appurtenances of said radio station, or to the effect that plaintiffs have no interest or right therein, or that plaintiffs merely have the possession of said radio station and concession in fraud of the rights of defendants or that defendants will file suit, attach or take other legal steps against persons doing business with any of the plaintiffs with respect to said radio concession or radio station; from interfering in any way directly or indirectly with the operation of said radio station by plaintiff Radio Difusora Internacional, S. A., or interfering with persons doing business or seeking to do business with said company or owning or seeking to purchase stock in said company;

3. That the injunction pendente lite herein be and the same is hereby dissolved and the parties and their surety released and discharged from all liability upon the surety bond on file herein supporting said injunction pendente lite;

4. That the defendants are not entitled to and none of the defendants have any interest in any of the plaintiffs;

5. That defendants take nothing by their Amended Answer or Amended Counter-Claim herein.

Dated: October 17, 1941.

/s/ H. A. HOLLZER,  
Judge.

Judgment entered Oct. 18, 1941.

Docketed Oct. 18, 1941.

[Endorsed]: Filed October 18, 1941. [116]

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[Title of District Court and Cause.]

NOTICE OF MOTION FOR ENFORCEMENT  
OF JUDGMENT AFTER LAPSE OF FIVE  
YEARS FROM DATE OF ENTRY

(California Code of Civil Procedure, Section 685.)

To Willis Allen, Lawrence W. Allen, M. M. Dexter,  
also known as M. F. Dexter, and Cinema Ad-  
vertising Agency, defendants.

Please Take Notice, that the undersigned will bring the attached motion on for hearing before this Court at Room 8, Federal Building, Los Angeles, California, on Monday, May 22, 1950, at 10 o'clock

in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ LEONARD HORWIN,  
Attorney for Plaintiffs.

[Endorsed]: Filed May 5, 1950. [117]

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[Title of District Court and Cause.]

MOTION FOR ENFORCEMENT OF JUDG-  
MENT AFTER LAPSE OF FIVE YEARS  
FROM DATE OF ENTRY

Plaintiffs move the court as follows:

That the court issue its order directing that writ of execution upon the judgment for plaintiffs herein in the sum of \$86,210.42 together with plaintiffs' costs in the sum of \$343.99 and interest at the statutory rate to date, issue against defendants, notwithstanding the lapse of more than five years since the entry of said judgment.

This motion is made upon notice to the judgment debtors, and is based upon plaintiffs' Memorandum of Points and Authorities, and the Affidavits of Leonard Horwin, William M. Rabow and Cleveland B. Swift, attached hereto.

/s/ LEONARD HORWIN,  
Attorney for Plaintiffs.

[Endorsed]: Filed May 5, 1950. [118]



[Title of District Court and Cause.]

## AFFIDAVIT OF LEONARD HORWIN

State of California,  
County of Los Angeles—ss.

Leonard Horwin, being first duly sworn, states:

At all times herein mentioned I was and am an attorney at law duly licensed as such under the laws and statutes of the State of California, and attorney for the plaintiffs herein.

On or about October 18, 1941, the Court, by the Honorable Harry Hollzer, Judge, deceased, entered judgment herein against the defendants, including judgment for damages for their fraud in the sum of \$86,210.42, together with plaintiffs' costs in the sum of \$343.99; that execution of said judgment was stayed until October 27, 1941;

That on February 11, 1942, Affiant caused said judgment to be recorded with the County Recorder of the County of Los Angeles at page 231 of Book 19078 of the Official Records, as a lien on any property defendants or any of them might possess or acquire;

That notwithstanding that defendants testified at the trial in this action that they and each of them were substantially without assets, and that the Court in its findings so found, Affiant from on or about October, 1941, to on or about August, 1942, sought to locate assets, if any, belonging to defendants, and available to satisfy the judgment herein. In that connection, [119] Affiant investigated the business,

political and other connections of each of the defendants, and confirmed that the defendants were promoters and managers of a statewide organization for so-called old age pensions popularly known as the "Ham and Eggs" organization, which said organization had collected substantial sums of money from great numbers of aged residents of the State of California; that nevertheless no assets were registered in the names of said defendants or any of them in the various registries of public records of the State of California and County of Los Angeles, other than the registration of the fictitious firm name of Cinema Advertising Agency, which said Agency had substantially no assets; that various other judgments and claims were already outstanding and unsatisfied for considerable periods of time against said defendants; that said defendants and each of them had a credit reputation for being "judgment proof"; that with the exception of their connection with said "Ham and Eggs" organization, said defendants had no visible sources of assets; that said "Ham and Eggs" organization denied payment of benefits to said defendants, or that defendants owned or benefitted from the assets of said organization; that defendants confirmed such denial, and further denied that they had any assets with which to satisfy the judgment herein; that there were no visible means by which to collect from said defendants; that the issuance of a writ of execution against them or the conduct of proceedings supplemental thereto, would be idle acts;

That, notwithstanding the following, Affiant, in

an effort to exercise all possible diligence on behalf of his clients, and with their consent, caused the judgment herein, on or about August, 1942, to be assigned for collection to United States Credit Bureau, a collection agency; [120]

That the efforts of said United States Credit Bureau to collect are as set out in the Affidavit of Cleveland B. Swift attached hereto; that periodically said Bureau kept the Affiant informed of said efforts and Affiant urged said Bureau to further efforts until April 2, 1949, when said Bureau returned the judgment herein to Affiant as uncollectible and said assignment was terminated;

That in a continued effort to exercise all possible diligence on behalf of his clients, Affiant, on or about June, 1949, caused the judgment herein to be assigned for collection to Pacific Coast Collection Service, 625 West Olympic Boulevard, Los Angeles, California, a collection agency.

That the efforts of said Service to collect are as set out in the Affidavit of William M. Rabow attached hereto; that periodically said Service kept Affiant informed of said efforts, and Affiant urged said Service to further efforts until February 2, 1950, when said Service returned said judgment to Affiant as uncollectible, and said assignment was terminated.

That plaintiffs through Affiant, their attorney, have exercised utmost diligence in endeavoring to collect said judgment from defendants but without locating assets out of which to satisfy said judgment; that on the basis of the results of said efforts,

plaintiffs did not cause a writ of execution to be issued herein or undertake proceedings supplemental thereto, for the reason that such writ and proceedings would have been idle acts and merely useless additions to the losses already incurred by plaintiffs by reason of the fraud of defendants as adjudicated herein;

That notwithstanding the bankruptcy of Willis Allen in 1943 and in accordance with the law applicable thereto, said Willis Allen continues liable along with the other defendants for the judgment herein, which is for fraud; [121]

That Affiant is informed and believes, and on the basis thereof avers that, notwithstanding failure of collection efforts to date, the defendants are now in a position to satisfy said judgment or a part thereof;

That no part of said judgment has been paid, and the whole of said judgment is due and unsatisfied;

That in accordance with Rule 69 of this Court and Section 685 of the Code of Civil Procedure of the State of California, Affiant prays this Court to order that a writ of execution based upon said judgment issue against the defendants herein.

/s/ LEONARD HORWIN.

Subscribed and sworn to before me this 10th day of April, 1950.

[Seal]      /s/ EDNA B. BENNETT,

Notary Public in and for this  
Said County and State.

[Endorsed]: Filed May 5, 1950. [122]

[Title of District Court and Cause.]

AFFIDAVIT OF CLEVELAND B. SWIFT

State of California,

County of Los Angeles—ss.

Cleveland B. Swift, being duly sworn states:

At the times mentioned herein I was and now am Department Manager of the United States Credit Bureau, 125 South Fremont Avenue, Los Angeles, California, in charge of collections of judgments and claims. I have specialized in such collections for some fifteen years and am thoroughly experienced therein.

On behalf of United States Credit Bureau Collection Agency established in Los Angeles and continuously active for some thirty years, I endeavored to collect the judgment in favor of plaintiffs in the within action in the manner hereinafter related.

In August, 1942, plaintiffs, by their attorney, Leonard Horwin, assigned said judgment to United States Credit Bureau for collection and efforts to collect were commenced immediately thereafter and pursued diligently until April 2, 1949, at which time the judgment was returned to plaintiff as uncollectible.

On or about August, 1942, and thereafter periodically until April 2, 1949, letters of demand for payment of said judgment were sent to each of the defendants without result. [123] On or about August, 1942, and periodically thereafter until April 2, 1949, the various public records of property transfers and ownership interests including indices of the Department of Motor Vehicles, records of the



County Recorder of Los Angeles County and of the County Assessor of Taxes, City Directory, Telephone Directory, and so forth, were checked to ascertain possible assets of the defendants but without result.

On or about August, 1942, and periodically thereafter during said period, defendants, Willis Allen and Lawrence Allen were contacted personally by telephone and otherwise but denied that they or any of the defendants herein had assets with which to satisfy the said judgment.

On or about August, 1942, and periodically thereafter during said period investigations of possible bank accounts and safety deposit boxes of the defendants were made in the various banks in the vicinity of their then address, to wit, 1731 North Highland Avenue, Hollywood, California, without result.

On or about July 27, 1943, affiant ascertained that the defendant, Willis Allen, had filed in bankruptcy in this Court under No. 42543-OC, and thereafter on or about October, 1943, was discharged as bankrupt with a finding of no assets.

From time to time during said period, reports appeared in the public press of the City of Los Angeles concerning political activities of the defendants, Lawrence W. Allen, and Willis Allen, and the political connections of said defendants, and on each of such occasions affiant endeavored to ascertain whether said activities and connections were productive of assets by which said judgment could be satisfied but without locating any assets.

Accordingly, notwithstanding most diligent efforts of affiant and United States Credit Bureau, no part of the within judgment is satisfied by defendants and no assets available to [124] satisfy said judgment could be located. Wherefore United States Credit Bureau returned the judgment to plaintiffs under date of April 2, 1949, as uncollectible and said assignment was accordingly terminated.

/s/ CLEVELAND B. SWIFT.

Subscribed and sworn to before me this 7th day of March, 1950.

[Seal]      /s/ ROGER K. LATHY,

Notary Public in and for  
Said County and State.

My Commission Expires April 9, 1952.

[Endorsed]: Filed May 5, 1950. [125]

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[Title of District Court and Cause.]

### AFFIDAVIT OF WILLIAM M. RABOW

William M. Rabow, being duly sworn states: At all times mentioned below I was and am a collector employed by Pacific Coast Collection Service, 625 West Olympic Boulevard, Los Angeles, California, in the collection of judgments and claims.

As such collector, and on behalf of Pacific Coast Collection Service, I endeavored in the manner hereinafter related, to collect the judgment for plaintiffs in the within case;

In June, 1949, the plaintiffs herein by means of their attorney, Leonard Horwin, assigned the judgment in their favor to Pacific Coast Collection Service for collection. Immediately following said assignment:

I ascertained on or about June 23, 1949, that the present business address of the defendants, Lawrence W. Allen, Willis Allen, M. F. Dexter, also known as M. M. Dexter, and Cinema Advertising Agency, is the law office of said Lawrence W. Allen, at 1204 South Hill Street, Los Angeles, California.

On or about the same date letters of demand for payment were written to each of the defendants at the said address and the defendant, Willis Allen, was contacted by me personally at which time said Willis Allen stated that neither he nor any of the other defendants had assets with which to [126] satisfy the judgment herein and that he, Willis Allen, had been adjudicated bankrupt in 1943 in the Federal District Court for this District and Division under No. 42543-O C.

On or about the same date I searched the records of the State of California and County of Los Angeles including indices of the Department of Motor Vehicles, Tax Assessor of Los Angeles County, County Recorder and other public records of ownership and ownership interests, and ascertained that no interests in the name of said defendants appeared except that said Cinema Advertising Agency was registered in the fictitious name files of Los Angeles County as a firm organized on September 3, 1947,

by the Defendant, Dexter, with then home address given as 6775 Hawthorne Avenue, Los Angeles.

I also checked the records of said bankruptcy action and ascertained that said Willis Allen was in fact adjudicated bankrupt in October, 1943.

Thereafter until February 2, 1950, said public records were periodically rechecked by affiant for the purpose of ascertaining assets of the defendants, without result, except as hereinafter mentioned. On or about October, 1949, affiant discovered that Willis Allen, 634 North Cherokee Avenue, Los Angeles, was the registered owner of a 1947 Cadillac Sedan, but the legal owners were given as Neil W. Allen and Shirley Jean Allen. Thereupon affiant endeavored to contact Neil W. Allen and Shirley Jean Allen and succeeded in October in speaking to the latter who refused to disclose the amount of indebtedness of the said vehicle. It also appeared that said Neil W. Allen and Shirley Jean Allen were blood relations of the defendant, Willis Allen, and that there was little or no possibility of establishing a net ownership interest of said defendant in said motor vehicle.

Periodically from June, 1949, to February 2, 1950, [127] affiant sent further letters of demand for payment of the judgment herein to the several defendants but without result.

Telephone calls to the defendant, Lawrence W. Allen, were likewise made repeatedly during said period but without result except that on or about October, 1949, the defendant, Lawrence W. Allen, stated to affiant that the defendant, M. F. Dexter,

also known as M. M. Dexter, had left Cinema Advertising Agency and gone east to an unknown address which said defendant refused to disclose.

Commencing in June, 1949, and periodically thereafter, affiant checked the various banks in the vicinity of Twelfth and Hill Street, Los Angeles, that is to say the vicinity of said office of the defendants, but without locating any accounts or safe deposit boxes in the name of any of the defendants.

Notwithstanding the efforts of affiant as aforesaid, no part of the judgment herein was satisfied by the defendants or any of them and affiant was unsuccessful, notwithstanding his most diligent efforts, in locating any of the assets of defendants out of which said judgment could be satisfied. Accordingly, the judgment herein was returned on February 2, 1950, to the plaintiffs herein by their attorney, Leonard Horwin, as uncollectible by Pacific Coast Collection Service and the assignment to said Service was terminated.

/s/ WILLIAM M. RABOW.

Subscribed and sworn to before me this 4th day of March, 1950.

[Seal]        /s/ BERTRAM COHN,

Notary Public in and for the County of Los Angeles,  
State of California. [128]



[Title of District Court and Cause.]

## MEMORANDUM OF POINTS AND AUTHORITIES

1. "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held . . . "

Rule 69(a) Rules of Civil Procedure for the District Courts of the United States.

In re Rebman, 150 F. 759 (CCA 9th, 1906)

2. "In all cases the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, and after due notice to the judgment debtor accompanied by an affidavit or affidavits setting forth the reasons for failure to proceed in compliance with the provisions of section 681 of this code . . . "

Section 685 California Code of Civil Procedure.

3. All that is required of the judgment creditor under CCP 685 is a showing of reasonable diligence in efforts to collect. A showing of compliance with average law office procedure in such matters, suffices.

Failure to cause writ of execution to issue, or proceedings supplementary to execution to be instituted earlier is not a defense, where it appeared from the public records or otherwise that such steps would have been idle acts. [129]

(a) “Respondent’s affidavit, although lacking in detail, appears to us to be sufficient. It indicates about the usual procedure that would be taken in the average law office to collect a judgment where the records revealed no assets belonging to the judgment debtor. Extreme diligence is not demanded nor is there anything in the law which requires the judgment creditor to institute proceedings supplemental to execution to compel the judgment debtor to appear in court to answer concerning his property.”

Terrill v. Shepherd, 57 CA (2d) 290 at 294-5 (3d dist 1943), granting execution after lapse of nine years from entry of judgment.

(b) “The law does not require idle acts and the statute under consideration should not be given a construction which would penalize a creditor for inactivity when he in good faith explores the available sources of information. There is no rule of law which requires a creditor to continue a vigorous search for something he believes does not exist and which does not in fact exist.”

(c) Helvey v. Castles, 73 CA (2d) 667, at 673 (2nd dist, 1946), granting execution ten years after entry of judgment.

“In the present case, as was said in Terrill v. Shepherd, 57 CA (2d) 290, 294, appellant’s affidavit seeking the relief afforded by section 685, ‘indicates about the usual procedure that would be taken in the average law office to collect a judgment where

the records revealed no assets belonging to the judgment debtor. Extreme diligence is not required.' ”

(d) *Twendle v. Clinch*, 74 CA (2d) 480 at 484 (2nd dist, 1948), granting execution thirteen years after entry of judgment.

Accord. *Greeley v. Benevolent Assn.* 28 CA (2d) 536 (1st dist 1938), granting execution nineteen years after entry of judgment. [130]

4. The mere lapse of time is not in itself a defense.

(a) “Diligence is required, but not extreme diligence, in attempting to enforce a judgment. The mere lapse of time is not in itself a sufficient ground for the denial of defendant’s motion (citing cases). The failure of a judgment creditor to take action to collect a judgment within five years after its entry is not ground for refusing to grant a motion for the issuance of an execution (citing cases), and the fact that at some time during the five-year period subsequent to the date of entry of judgment appellant may have had property that could have been levied on pursuant to section 681 is not a sufficient reason for a denial of relief under section 685 (citing cases). Orders have been sustained for the issuance of executions after twenty years (*Weldon v. Rogers*, 159 Cal. 700); after nineteen years (*Peers v. Stoll*, 32 CA (2d) 511; ) after sixteen years (*Trendle v. Clinch*, 74 CA (2d) 480); *McClelland v. Shaw*, 23 CA (2d) 107; after fourteen years (*Bredfield v. Hannon*, 151 Cal. 497; ) *Doehla v. Phillips*, 151 Cal. 488; *Helvey v. Castles*, 73 CA (2d)

667; after thirteen years (*Welk v. Connor*, 102 CA 286; ) after 12 years (*Mohr v. Ricconi*, 14 CA (2d) 416); (*Corcoran v. Duffy*, 18 CA (2d) 658); *Crowley v. Super Ct.*, 17 CA (2d) 52.”

Long v. Long,

76 CA (2d) 716 at 721-2 (2nd dist 1946),  
granting execution fourteen years after entry  
of judgment.

(b) *Faias v. Superior Court*,  
133 CA 525 (1st dist 1933)

5. Upon a showing of reasonable diligence, it is incumbent upon the judgment debtor, not only to disprove it, but also to show that he was harmed by the lapse of time in issuance of the writ of execution, and denial of the judgment creditor’s motion in the absence of such a showing by the judgment debtor is reversible error.

(a) “The doctrine of laches can be invoked only where by reason of Plaintiff’s acts, the allowance of the claim would work [131] an unwarranted injustice. (*Hovey v. Bradbury*, 112 Cal 620, 625)”

Long v. Long,

76 CA (2d) 716, at 722 (2nd dist 1946)

(b) “When a judgment creditor has made a prima facie showing of due diligence it is incumbent on the debtor to show, if he can do so, that the creditor’s due diligence was not due diligence because the debtor did in fact hold title to property, which was not exempt from execution, during the five years following the entry of judgment, in such

a manner that the creditor in the exercise of due diligence could have subjected it to execution. Each case is to be determined upon its particular circumstances.”

So. Cal. Tel. Co. v. Damenstein,  
81 CA (2d) 216 (2nd dist 1947)

granting execution thirteen years after entry of judgment.

(c) “It is the intent of the law, and it would seem the intent as well of good morals, that everyone being able should pay his debts. Here we find the debt ripened into a judgment. Several years go by and it is not paid. The law does not contemplate that, the time of the statute of limitations having run, the liability to pay has completely passed. The motion made in this case, is provided for by law. There must, then, be something added to the mere fact of the expiration of time and that the judgment debtors were possessed of personal property, which would move the court to deny the right given by the statute, section 685 of the Code of Civil Procedure.

“Laches in legal significance, is not mere delay, but delay that works a disadvantage to another” (citing cases).

Demens v. Huene, 89 CA 748 at 752 (2nd dist 1928), granting execution after ten years from entry of judgment.

(d) “We see no force whatever in the contention that in making the order for the issuance of the execution, under the circumstances here appearing,



the lower court was guilty of an abuse of the discretion confided to it. Admittedly, the judgment, which was for money loaned to the appellant, had never been satisfied in whole or in part, and no reason whatever appeared [132] why in equity and good conscience he should not be compelled to pay the same. The failure of Plaintiff to earlier enforce the judgment which appellant should and could have at any time voluntarily paid, was entirely without prejudice to any of his legal rights, and did not render the granting of the order an abuse of discretion. Under such circumstances it would appear that the exercise of a sound discretion would require the enforcement of the judgment. What we have said upon the claim as to abuse of discretion sufficiently disposes of the claim that Plaintiff was not entitled to the remedy afforded by section 685 of the C.C.P for the collection of his judgment, by reason of laches.”

*Doehla v. Phillips*, 151 Cal. 488, at 495 (1907), granting execution more than fourteen years after entry of judgment.

6. Enforcement of judgment in damages for fraud is not barred by bankruptcy of the judgment debtor, and filing proof of claim in bankruptcy proceeding is not waiver of claim for fraud. (Note: reference here is to the defendant Willis Allen who was adjudicated bankrupt in 1943).

(a) U. S. Bankruptcy Act as amended, 52 Stat 581 11 USCA 35.

(b) *Matthewson v. Naylor*, 18 CA (2d) 741  
(2nd dist 1937)

*Wilson v. Walters*, 19 C (2d) 111 (1941)

*In re Sideman*, 32 F Supp 574 (DCNY 1940)

*In re Birdwell*, 27 F Supp 442 (DC Tex 1939)

*Berkner v. Rubin*, 260 NYS 747

*Brown v. Hannegan*, 210 Mass 246, 96 NE 714  
(1911).

Dated: 31st day of March, 1950.

LEONARD HORWIN,  
Attorney for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE  
OF A. PHILLIPS

State of California,  
County of Los Angeles—ss.

A. Phillips, being sworn says: I am and was on the dates herein mentioned over the age of eighteen years and not a party to this action; I served the Notice of Motion for Enforcement of Judgment After Lapse of Five Years from Date of Entry in this action by personally delivering to and leaving with the following persons at the County of Los Angeles, to wit, 1204 South Hill Street, City of Los Angeles, on the dates set opposite their respective names, a true copy thereof, to wit:

Willis Allen, April 13, 1950.

/s/ A. PHILLIPS.

Subscribed and sworn to before me this 3rd day of May, 1950.

[Seal]            /s/ [ILLEGIBLE],  
Notary Public in and for the County of Los Angeles,  
State of California.

My Commission expires December 16, 1953.

[Endorsed]: Filed May 5, 1950. [134]

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[Title of District Court and Cause.]

AFFIDAVIT OF WILLIS ALLEN IN OPPO-  
SITION TO PLAINTIFFS' MOTION FOR  
ENFORCEMENT OF JUDGMENT AFTER  
LAPSE OF FIVE YEARS FROM DATE OF  
ENTRY

State of California,  
County of Los Angeles—ss.

Willis Allen being sworn says, that he is one of the defendants in the above entitled action. That he makes this affidavit in behalf of himself and in behalf of all of the defendants who have appeared herein.

That neither he, nor any of the defendants herein, either while acting for himself or as agent for another, has at any time ever profited or received or obtained any property either real or personal or any money or benefit from any of the plaintiffs herein or from any other person connected with or involved in the transaction which was the basis of

the cause or causes of action for which judgment was given for the plaintiffs in this case No. 827-H in the United States District Court, Southern District of California, [135] Central Division.

That on or about July 27, 1943, affiant was adjudicated a bankrupt in this court under file No. 42543-OC and received his discharge in bankruptcy therein on or about October 13, 1943. That the indebtedness of the affiant to the plaintiffs herein was duly scheduled in said bankruptcy proceedings in time for proof and allowance, with the name of the creditor. That no money or property has ever been obtained by this affiant or by any of the defendants herein from the plaintiffs by false pretenses or by false representations, or by fraud while acting as an officer or in any fiduciary capacity, or otherwise or at all.

That therefore, the said debt and obligation of the defendants to the plaintiffs herein, insofar as this affiant is concerned, was released and discharged by said bankruptcy proceedings.

Furthermore, that the plaintiffs herein have not used due diligence and have not used even the minimum diligence required by law to entitle plaintiffs to an order granting plaintiffs' motion herein, for the following reasons, to wit:

(a) That within the five year period after the entry of judgment on or about October 18, 1941, this affiant acquired real property in his own name and the same was recorded in the office of the County Recorder of L. A. County on Feb. 27, 1945, and remained so recorded until long after the expiration

of the five year period following the entry of judgment herein, to wit until Jan. 15, 1949; that during said entire period from Feb. 27, 1945, until Jan. 15, 1949, there was no homestead filed thereon and said property had value in excess of \$10,000 over and above all of the encumbrances thereon and was subject to levy of execution by plaintiff, except for affiant's discharge in bankruptcy.

(b) That a mortgage upon real property in the County of Los Angeles in the sum of \$500 in which defendant Lawrence W. Allen [136] was named as the mortgagee was placed of record in the office of the County Recorder of Los Angeles County on or about March 31, 1948; that the plaintiffs herein, according to the affidavits filed herein by the plaintiffs in support of this present motion, appear not to have discovered or learned of said mortgage.

(c) That within the five year period following the entry of judgment herein, plaintiffs did not locate any property belonging to defendants subject to levy of execution; that plaintiffs within said five year period did not call to the attention of the court any property belonging to the defendants which was subject to levy of execution. That subsequent to the expiration of said five year period following the entry of judgment herein the plaintiffs have not located any property belonging to defendants subject to levy of execution and even now in their present application to the court do not call to the attention of the court any property belonging to the defendants which is subject to levy of execution.

(d) This affiant denies that the plaintiffs or their



attorneys have any basis of fact or any information upon which to predicate that portion of the affidavit of Leonard Horwin herein, wherein on page 4 thereof, lines 1 to 4 inclusive, said Leonard Horwin avers "That affiant (Horwin) is informed and believes, and on the basis thereof avers, that . . . the defendants are now in a position to satisfy said judgment or a part thereof."

(e) This affiant denies that this defendant or any of the defendants are now in a position to satisfy said judgment or any portion thereof.

That it would be inequitable and prejudicial to the defendants for the Court to grant plaintiffs' motion at this remote date not only in view of plaintiffs' lack of due diligence, but also because defendants have relied upon such lack of diligence and have therefore conducted themselves on the assumption that the plaintiffs no longer had the right to enforce said judgment. [137]

That in accordance with law, this affiant on behalf of himself and his co-defendants prays this Court to deny plaintiffs' motion not only as to this affiant but also as to all of the defendants herein.

/s/ WILLIS ALLEN.

Subscribed and sworn to before me this 1st day of July, 1950.

[Seal]      /s/ RUTH KEDDINGTON,  
Notary Public in and for the County of Los Angeles,  
State of California. [138]

DEFENDANTS' MEMO. OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF JUDGMENT AFTER LAPSE OF FIVE YEARS FROM DATE OF ENTRY

(1) The Bankruptcy Act states:

“A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as are liabilities for obtaining money or property by false pretenses or false representations . . .

11 U.S.C.A. 35 Chap. III, Sec. 17.

(2) By express provisions of the Act, there is excepted from the operation of a discharge a liability for obtaining property by false pretenses or false representations, obligations of this nature surviving the discharge thereunder. For the liability to come within this provision of the Act, it must appear

(a) that the bankrupt has made false representations,

(b) that these false representations were made with the intention of defrauding the creditor,

(c) that the creditor relied upon and was misled by the false representations,

(d) and that property or money was obtained as a result thereof.

If any one or more of these elements are lacking, the obligation will not survive the discharge in bankruptcy.

8 C.J.S., Bankruptcy Sec. 573, at pages 1513, 1514.

(3) "Not all frauds come within this exception to the operation of a discharge. It is only fraud in obtaining property by false pretenses or false representations which prevents the release of the bankrupt from the liability based thereon."

8 C.J.S., Bankruptcy, Sec. 573, page 1516.

*Zimmeren vs. Blount*, 238 Fed. Rep. 740, quoting from the syllabus, says: "Though a fraud may be committed in ways other than by false representation and still be actionable, it is only fraud by obtaining property by false pretenses or false representations which prevents the release of the bankrupt from his provable debts under the Bankruptcy Act July 1, 1898."

(4) Debts Not Affected by Discharge in Bankruptcy.

"In order to establish the liability of the bankrupt for such debt, the elements of the transaction must amount to obtaining property by false pretenses or false representation."

4 Cal. Jur. Bankruptcy, Sec. 32, page 86.

Bankruptcy will not discharge debt where the fruits of the wrong were received and used by the partnership.

*Crespi vs. Giffen*, 132 Cal. App. 526, 23 Pac. (2nd) 47.

(5) Obtaining Property as Prerequisite.

"The bankrupt must have obtained property for himself, or as agent, or have benefited therefrom, to bring him within the exception"

. . . "It is essential, of course, that property should have been obtained by the bankrupt as a result of the false representations, either for himself, or as agent for another."

8 C.J.S., Bankruptcy, Sec. 573, page 1518.

(6) Reason for Rule.

"We assume, in the consideration of the question, that Congress intended the language of the statute to be understood in its ordinary signification, and that the [140] purpose of the law was to prevent the bankrupt from retaining the benefits of property acquired by fraudulent means."

8 C.J.S., Bankruptcy, Sec. 573, page 1518, quoting from *Rudstrom vs. Sheridan*, 142 N.W. 313, 122 Minn. 262.

(7) Burden of Proof.

The burden of proof that a debt comes within an exception provided by Section 17 of the Bankruptcy Act rests upon the creditor. A creditor who would avoid the effect of a discharge in bankruptcy as to a judgment held by him against the bankrupt has the burden of proof that the note or obligation upon which the judgment was taken was an exception to the discharge.

6 Am. Jur. Bankruptcy, Sec. 810 and Sec. 813 (citing *Kreitlein vs. Ferger*), 238 U. S. 21, 59 L. Ed. 1184, 35 S. Ct. 685.

(8) Determination of Character of the Judgment Held by Plaintiffs.

In ascertaining whether a liability on a judgment was discharged in bankruptcy, the Court will go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and, when necessary, extrinsic evidence will be received for the purpose of determining the character of the debt.

Fitzgerald vs. Herzer (1947) 78 C.A. 2nd 127, 177 Pac. (2nd) 364.

“In determining whether the collection of the judgment, indicating that it was based upon fraud and deceit is barred by debtor’s discharge in bankruptcy, the language of the original judgment is not controlling as [141] to either party, but the record must be examined to determine the true nature of the acts upon which the judgment was based.”

Tudryck vs. Mutch (1948) 30 N.W. (2nd) 512, 320 Mich. 86.

(9) What Constitutes Due Diligence.

“It must be conceded that the mere examination of public records in the hope that a judgment debtor will acquire property in his own name constitutes a minimum of effort to locate property subject to execution, but it does not follow as a matter of law that more must be done under all circumstances to avoid a charge of negligence.”

Helvey vs. Castles, 73 C.A. 2nd 667, 167 Pac. 2nd 492.



Where, as here, the plaintiffs have not used even the minimum diligence required by law to avoid defendants' charge of lack of diligence amounting to negligence in locating and levying on property belonging to defendants, the plaintiffs have not made a showing sufficient to entitle them to the issuance of the order prayed for.

(10) Defendants' Comment on Plaintiffs' Memorandum of Points and Authorities.

Plaintiffs' Memorandum of Points and Authorities is divided into six paragraphs. The first five paragraphs thereof are devoted to plaintiffs' endeavor to convince this Court that the plaintiffs are entitled to enforce their judgment after a lapse of five years from date of entry.

Defendants find no fault and have no quarrel with the law laid down in any or all of the cases and authorities [142] cited by the plaintiffs in the first five paragraphs of plaintiffs' Memo.

Unfortunately for the plaintiffs, however, the law cited does not fit the undisputed facts in this case. The affidavit of defendant Willis Allen filed herein shows that the plaintiffs have not used due diligence or any diligence in locating and levying upon property belonging to the defendants during the five-year period following the entry of judgment.

Therefore, the cases which plaintiffs have cited in the first five paragraphs of their Memo. of Points and Authorities support the defendants rather than the plaintiffs.

Defendants particularly call the Court's attention to one of the cases cited and relied upon by plaintiffs, to wit: the case of Southern California Telephone Company vs. Damenstein, 81 Cal. App. 2nd 216, 224, and to the following cases referred to in the opinion in that case, namely, Beccuti vs. Columbo Baking Company, 21 Cal. 2nd 360, 132 Pac. 2nd 207; Hatch vs. Calkins, 21 Cal. 2nd 364; John P. Mills vs. Shawmut, 29 Cal. 2nd, page 63, 179 Pac. 2nd 570; Helvey vs. Castles, 73 Cal. App. 2nd 667.

All of these cases hold that where a judgment creditor has prima facie shown due diligence in an effort to collect a money judgment, a debtor may overcome such prima facie case by showing that the creditor's alleged due diligence was not actually such because the debtor held title to property not exempt from execution during the five years after the entry of judgment in such manner that the creditor in the exercise of due diligence could have subjected it to execution.

The Helvey vs. Castles case, *supra*, holds that the examination of public records for real property recorded in [143] the name of the debtor constitutes the minimum of diligence which a judgment creditor must exercise in order to avoid a charge of negligence.

It must be apparent then, that the plaintiffs herein did not exercise even that small required minimum of effort, otherwise they would have found property recorded in the name of defendant Willis Allen during the last year and eight months

of the five-year period following the entry of judgment and for several years thereafter.

Failure of the plaintiff to examine the defendants on supplementary proceedings would not in itself constitute failure on the part of plaintiff to exercise due diligence. But such failure to examine the defendants on supplementary proceedings when coupled with plaintiffs' failure to examine public records during the last year and eight months of the five-year period following the entry of judgment, may be taken into consideration by this Court when passing upon defendants' charge of lack of due diligence by the plaintiffs.

(11) Defendants' Comment on Paragraph 6 of Plaintiffs' Memorandum of Points and Authorities.

This, in Defendants' opinion, is the most important point in this case, yet plaintiffs devote to it only one short paragraph of 14 lines citing the Bankruptcy Act, and six cases.

Not one of the six cases cited support the plaintiff, instead, they support the defendants.

Plaintiffs contend that the right of enforcement of a judgment for damages for fraud survives the bankruptcy of the judgment debtor. Plaintiffs are warranted in that statement only to the extent of the provisions of the Bankruptcy Act as [144] amended.

Section 17 of the Act lists six cases of debts from which a debtor cannot be released from bankruptcy.

The second classification listed in Section 17 consists of "Liability for obtaining money or property by false pretenses or false representation," etc.

As defendants have pointed out in the foregoing Memo. of Points and Authorities it is only where the defendants have obtained money or property by false pretenses or false representations that the debt is not released by discharge in bankruptcy.

(Sub. 4) of Section 17 refers to another class of debts not released by discharge in bankruptcy, namely, "Those created by fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." Plaintiffs do not claim that the debt represented by plaintiffs' judgment against the defendants herein was created while any of the defendants were acting as an officer or in any fiduciary capacity.

Therefore, unless plaintiffs can show that plaintiffs' judgment, even though it be for fraud, is based upon a liability for obtaining money or property by false pretenses or false representations, must concede that the discharge in bankruptcy released the defendant Willis Allen from the debt.

Plaintiffs' affidavit in support of the present motion did not charge that plaintiffs' judgment is based upon a liability for obtaining money or property by false pretenses or false representations. The affidavit of defendant Willis Allen is undisputed to the effect that none of the defendants have obtained any money or property from any of the plaintiffs by false pretenses or by false representations, or otherwise, or at all. [145]

If it becomes necessary, an inspection of the entire record in this case will show that no money or property ever passed from the plaintiffs to the defendants.

In each of the six cases cited by plaintiffs in paragraph 6 of plaintiffs' Memo. of Points and Authorities, it will be observed that the defendants obtained either money or property by false pretenses or false representations. Therefore, the six cases cited by the plaintiffs fail to support their claim that the judgment herein was not released as to the defendant Willis Allen by his discharge in bankruptcy, and are not in point.

In fact, the six cases cited support the defendants who claim that the discharge in bankruptcy released the defendant Willis Allen from the debt because it was not a liability for obtaining money or property by false pretenses or false representations.

The debt therefore does not survive the discharge in bankruptcy of defendant Willis Allen.

Dated July 1, 1950.

Respectfully submitted,

/s/ LAWRENCE W. ALLEN,

Attorney for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed July 3, 1950. [146]



In the United States District Court, Southern  
District of California, Central Division  
No. 827

M. P. BARBACHANO, et al.,

Plaintiffs,

vs.

LAWRENCE W. ALLEN, WILLIS ALLEN,  
M. F. DEXTER, CINEMA ADVERTISING  
AGENCY, et al.,

Defendants.

ORDER

Westover, J.

Plaintiffs herein made a Motion for Enforcement of Judgment After Lapse of Five Years From Date of Entry. The Notice of Motion was directed to Willis Allen, Lawrence W. Allen, M. M. Dexter, also known as M. F. Dexter, and Cinema Advertising Agency, defendants, and said plaintiffs moved the court to issue its order directing that Writ of Execution upon the judgment for plaintiffs herein in the sum of \$86,210.42, together with costs in the amount of \$343.99 and interest at the statutory rate to date, issue against defendants, notwithstanding the lapse of more than [147] five years since the entry of said judgment.

The matter came on regularly for hearing on July 3, 1950, in the above-entitled court before Honorable Harry C. Westover, judge presiding, Leonard Horwin, Esquire, appearing as attorney for plaintiffs and Lawrence W. Allen, Esquire, ap-

pearing as attorney for defendants, and evidence having been introduced and the parties having filed briefs herein, and the matter having been submitted to the Court for decision.

The Court Finds that subsequent to entry of said judgment defendant, Willis Allen, filed a petition in bankruptcy in which petition said judgment was listed; that thereafter said Willis Allen received a discharge in bankruptcy and has been thereby released from the liability of the judgment.

The Court Further Finds that plaintiffs have not been guilty of laches and that the judgment may be enforced or carried into execution, irrespective of the fact that more than five years have elapsed from the date of its entry.

Wherefore, It Is Ordered that the Writ of Execution upon the judgment for plaintiffs herein in the sum of \$86,210.42, together with plaintiffs' costs amounting to \$343.99, and interest at the rate of seven (7%) per cent per annum, issue against all defendants named in said judgment, with the exception of defendant Willis Allen.

Dated: Oct. 12, 1950, Los Angeles, Calif.

/s/ HARRY C. WESTOVER,

United States District Judge.

Judgment entered Oct. 13, 1950.

[Endorsed]: Filed October 12, 1950. [148]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT  
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that M. P. Barbachano and The Border Electric and Telephone Co., Inc., a corporation, plaintiffs and judgment creditors in the above-entitled action, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the following described parts only of the Order of the Honorable Harry C. Westover, United States District Judge, dated October 12, 1950, and entered October 13, 1950, at Book 68, page 471, of Judgments, to wit:

The part of said Order contained on page 2 thereof, lines 10 to 15, wherein the Court finds that the defendant Willis Allen has been "released from the liability of the judgment" herein by his "discharge in bankruptcy" "subsequent to entry of said judgment"; and

The part of said Order contained on page 2 thereof, [149] at line 25, wherein the Court orders that the defendant Willis Allen be excepted from the writ of execution ordered to issue "against all defendants named in said judgment," thereby denying execution upon the judgment as to the defendant Willis Allen.

Dated: October 20, 1950.

/s/ LEONARD HORWIN,

Attorney for Appellants M. P. Barbachano and The  
Border Electric and Telephone Co., Inc., a  
Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 10, 1950. [150]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 160, inclusive, contained the original Amended Complaint for Declaratory Relief, for Injunction and for Rescission and Damages; Amended Answer of Defendants Lawrence W. Allen, Willis Allen, Cinema Advertising Agency, and M. M. Dexter and Counter-Claim; Objection to Granting of a Temporary Injunction and Affidavits of Lawrence W. and Willis Allen; Petition for Leave to File Amendment to Amended Complaint and Amendment to Plaintiffs' Reply to Defendants' Amended Counter-Claim with Order Thereon Allowing; Amendment to Plaintiffs' Amended Complaint; Plaintiffs' Partial Itemized Account of Costs of Procuring Radio Concession and Constructing and Maintaining Radio Station XERB; Plaintiffs' Additional Itemized Account of Costs of Procuring Radio Concession and Constructing and Maintaining Radio Station XERB; Memorandum of Conclusions, Judge Hollzer; Findings of Fact and Conclusions of Law; Judgment; Notice of and Motion for Enforcement of Judgment After Lapse of Five Years from Date of Entry with Affidavits of Leonard Horwin, Cleveland B. Swift, William M. Rabow and Memorandum of Points and Authorities; Affidavit of Willis Allen in Opposition to Plaintiffs' Motion for Enforcement of Judgment

After Lapse of Five Years from Date of Entry, and Defendants' Memo. of Points and Authorities in Opposition to Plaintiffs' Motion for Enforcement of Judgment After Lapse of Five Years from Date of Entry; Order; Notice of Appeal; Appellants' Designation of the Points on Which They Intend to Rely on Appeal; and Appellants' and Appellees' Designations of Contents of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.80, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 30th day of November, A.D. 1950.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.



[Endorsed]: No. 12759. United States Court of Appeals for the Ninth Circuit. M. P. Barbachano and The Border Electric and Telephone Co., Inc., Appellants, vs. Lawrence W. Allen, Willis Allen, M. F. Dexter and Cinema Advertising Agency, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 1, 1950.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit  
Case No. 12759

M. P. BARBACHANO, et al.,

Appellants,

vs.

LAWRENCE W. ALLEN, et al.,

Appellees.

APPELLANTS' DESIGNATION OF THE  
POINTS ON WHICH THEY INTEND TO  
RELY ON APPEAL

(Rule 19, Subdivision 6)

The appellants, M. P. Barbachano and The Border Electric and Telephone Co., Inc., a corporation, hereby designate the following points on which they intend to rely on appeal:

(1) That the District Court erred in finding that the defendant Willis Allen had been released from the liability of the judgment herein by his discharge in bankruptcy;

(2) That the District Court erred in ordering that the defendant Willis Allen be excepted from the writ of execution ordered to issue against all defendants named in said judgment, and in denying execution upon the judgment as to the defendant Willis Allen;

(3) That the judgment for damages in favor of the appellants herein and against the defendants

including Willis Allen comes within Section 17 of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 550, 11 USCA 35, as amended) which provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another," and that accordingly the defendant Willis Allen was not released from the liability of said judgment by his discharge in bankruptcy, and the District Court committed reversible error in denying execution upon the judgment as to the defendant Willis Allen.

Dated: December 5, 1950.

/s/ LEONARD HORWIN,  
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1950.

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[Title of Court of Appeals and Cause.]

APPELLANTS' DESIGNATION  
OF CONTENTS OF RECORD OF APPEAL

(Rule 19, Subdivision 6)

M. P. Barbachano and The Border Electric and Telephone Co., Inc., a corporation, appellants herein, herewith designate the following portions

of the record, proceedings, and evidence to be contained in the record on appeal:

(1) Plaintiffs' "Amended Complaint" dated June 3, 1940, and filed herein on or about the same date;

(2) The "Amended Answer of the defendants Lawrence W. Allen, Willis Allen, Cinema Advertising Agency and M. F. Dexter and Counterclaim" dated June 24, 1940, and filed herein on or about the same date;

(3) Plaintiffs' "Petition for Leave to File Amendment to Amended Complaint and Amendment to Plaintiffs' Reply to Defendants' Amended Counterclaim," and order granting it, both dated and filed herein on or about May 19, 1941;

(4) "Amendment to Plaintiffs' Amended Complaint," dated May 19, 1941, and filed herein on or about the same date;

(5) "Memorandum of Conclusions, Judge Hollzer, September 17, 1941," filed herein on or about that date;

(6) The Court's "Findings of Fact and Conclusions of Law," signed and filed herein on or about October 18, 1941;

(7) The Court's Judgment, made and entered herein on or about October 18, 1941;

(8) Plaintiffs' "Notice of Motion for Enforcement of Judgment after Lapse of Five Years from Date of Entry" (California Code of Civil Pro-

cedure, Section 683) and the "Motion for Enforcement of Judgment after Lapse of Five Years from Date of Entry" and attachments thereto, all filed herein on or about May, 1950;

(9) "Affidavit of Willis Allen in Opposition to Plaintiffs' Motion for Enforcement of Judgment after Lapse of Five Years from Date of Entry," dated July 1, 1950, and filed herein at a date in July of 1950;

(10) The Court's "Order for Writ of Execution on Judgment," dated October 12, 1950, and entered herein on October 13, 1950.

Also Notice of Appeal.

Clerk's Certificate.

Dated: December 5, 1950.

/s/ LEONARD HORWIN,  
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1950.





No. 12759  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

M. P. BARBACHANO, *et al.*,

*Appellants,*

*vs.*

LAWRENCE W. ALLEN, *et al.*,

*Appellees.*

---

Opening Brief of Appellants M. P. Barbachano and the  
Border Electric and Telephone Co., Inc., a Cor-  
poration. (C. C. A. Rule 20(1).)

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LEONARD HORWIN,  
121 South Beverly Drive, Beverly Hills,  
*Attorney for Appellants.*



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Opening Brief of Appellants M. P. Barbachano and the  
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I.  
**Jurisdiction.**

This action was brought by citizens of the Republic of Mexico against citizens of the State of California, and was for various relief including damages for fraud and other intentional injury. [Amended Complaint, pars. II and III, Transcript of Record\* 4.]

The amount in controversy exceeded and exceeds \$3,-000.00. [Amended Complaint par. XXIII, Tr. 14.]

Jurisdiction of the District Court was founded on diversity of citizenship. (28 U. S. C. A., Sec. 1332.)

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\*Transcript of Record hereinafter abbreviated as Tr.

Judgment in the District Court, entered October 18, 1941, was in favor of plaintiff-appellants for damages for fraud and other intentional injury inflicted by the defendants, in the sum of \$86,210.42, together with plaintiff-appellants' costs amounting to \$343.99. [Tr. 108.]

The present appeal arises out of an Order of the District Court entered October 13, 1950, granting plaintiff-appellants' motion for enforcement of judgment notwithstanding the lapse of five years from date of entry, but excepting the defendant-appellee Willis Allen from execution, on the basis of his discharge in voluntary bankruptcy. [Tr. 142, 143.]

The appeal is only from that part of the Order denying enforcement as to Willis Allen. [Tr. 144.]

Jurisdiction of the Circuit Court of Appeals is based on the provision for review of final decisions of the District Courts, as contained in 28 U. S. C. A., Section 1291. (Judicial Code, Section 128, as amended.)

Appeal was taken from the relevant parts of the Order of the District Court as provided in Rule 73(b) of the Federal Rules of Civil Procedure.

II.

Statement of the Case.

A. SUMMARY.

Plaintiffs' judgment is composed of damages flowing from the fraud of defendants and their conspiracy to prevent plaintiffs' enjoyment of their property, by means of wrongful attachment and defamation of plaintiffs' title thereto.

The District Court found that plaintiffs have shown due diligence in enforcement of their judgment and accordingly ordered that execution issue thereon notwithstanding the lapse of more than five years from date of entry. [Tr. 143.]

However, the defendant WILLIS ALLEN claimed that as to him, execution is barred by his voluntary discharge in bankruptcy after entry of judgment herein.

He sought successfully below to avoid the effect of his fraud on the ground that neither he nor the other defendants obtained plaintiffs' property thereby. [Tr. 130.]

PLAINTIFFS SUBMIT THAT THE LIABILITY OF WILLIS ALLEN FOR FRAUD WAS NOT DISCHARGED. THE FACT THAT THE BANKRUPT DID NOT HIMSELF RECEIVE THE PROPERTY INDUCED BY HIS FRAUD IS NOT A DEFENSE UNDER SECTION 17A OF THE BANKRUPTCY ACT (11 U. S. C. A., SEC. 35) WHERE AS HERE HE OBTAINED PROPERTY FROM PLAINTIFFS FOR THE BENEFIT OF AN ENTERPRISE IN WHICH THE PARTIES WERE MUTUALLY INTERESTED, AND BUT FOR THE FRAUD OF DEFENDANTS, WOULD HAVE CONTINUED TO BE MUTUALLY INTERESTED.



PLAINTIFFS ALSO SUBMIT THAT, INSOFAR AS THE JUDGMENT IS COMPOSED OF ADDITIONAL DAMAGES FOR INJURIES TO PLAINTIFFS' PROPERTY FLOWING FROM DEFENDANTS' CONSPIRACY TO PREVENT PLAINTIFFS' COMMERCIAL OPERATIONS BY WRONGFUL ATTACHMENT OF THEIR EQUIPMENT AND SLANDER OF THEIR TITLE, THE LIABILITY OF DEFENDANTS IS CLEARLY NON-DISCHARGEABLE UNDER THE SECOND HALF OF THE SECOND CLAUSE OF SECTION 17A OF THE BANKRUPTCY ACT RELATING TO WILFUL AND MALICIOUS INJURY TO THE PROPERTY OF ANOTHER.

## B. THE FACTS.

The findings and conclusions of the District Court upon which the Judgment was founded, are that plaintiffs M. P. BARBACHANO and THE BORDER ELECTRIC & TELEPHONE Co., Inc., of Mexico entered into a written agreement under date of March 30, 1936, with defendants LAWRENCE W. ALLEN, WILLIS ALLEN and M. F. DEXTER, doing business under the fictitious firm name of CINEMA ADVERTISING AGENCY. [Memorandum of Conclusions of JUDGE HOLLZER,\* filed September 17, 1941, at Tr. 58; Findings of Fact and Conclusions of Law of JUDGE HOLLZER,\*\* filed October 18, 1941, at Tr. 78.]

This Agreement is annexed to the Amended Complaint as Exhibit A. [Tr. 22-25.]

It provides that the mentioned plaintiffs would obtain a permit from the Mexican Government for the operation of a radio broadcasting station at Rosarito Beach, Baja,

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\*Hereinafter abbreviated as "Conclusions," with reference to page numbers in the Transcript.

\*\*Hereinafter abbreviated as "Findings," with reference to page numbers in the Transcript.

California, Mexico, by a Mexican corporation [par. 5 at Tr. 23] of which 80% of the capital stock would be controlled by the mentioned defendants and 20% by these plaintiffs. [Par. 9 at Tr. 24-25.]

Plaintiffs would “furnish us” (*i. e.* the corporation controlled by defendants) “without cost,” with the lands and buildings necessary to house the studios, transmitter and antenna [par. 5 at Tr. 23], whereupon these defendants would construct the radio station at their “own expense.” [Par. 1 at Tr. 22. ]

THE AGREEMENT AND THE SUBSEQUENT RELIANCE OF PLAINTIFFS THEREON WERE INDUCED BY THE MATERIAL AND KNOWINGLY FALSE REPRESENTATIONS OF THESE DEFENDANTS REGARDING THEIR FINANCIAL RESOURCES, ABILITY TO PERFORM IT AND ACTUAL PERFORMANCE. [Conclusions, Tr. 58-62; Tr. 63-67, and Tr. 74; Findings, par. V, at Tr. 78-79; pars. XXXIV-XXXVI, at Tr. 42-93.]

Plaintiffs eventually discovered the fraud of defendants, and therefore terminated the agreement on or about October 5, 1936. [Conclusions, Tr. 60, 74.]

Meanwhile, however, plaintiffs had acted in reliance upon these false representations of the defendants, by investing on behalf of the enterprise contemplated by the agreement, sums totaling in excess of \$30,000, to wit, 11,000 pesos or the then equivalent of about \$3000 to procure the radio station permit [Conclusions, at Tr. 67-68], plus \$27,000 to furnish the land, buildings and power facilities required of plaintiffs [Conclusions, Tr. 63; Findings, par. VII, at Tr. 79, verifying par. X of the Amended Complaint, at

Tr. 7], plus additional cost to remove from their land a smaller radio station then located there. [Conclusions, Tr. 62; Findings, par. VIII, at Tr. 79-80.]

Having been induced by defendants' fraud to incur the aforesaid investment and commit themselves to the Mexican Government in procuring the permit, plaintiffs upon discovery of defendants' fraud and inability to construct the radio station were compelled to proceed with construction in accordance with the permit [Conclusions, Tr. 71; Findings, par. XIII, at Tr. 82, verifying the allegations of Paragraph XIX of the Amended Complaint, at Tr. 11], at a total cost of \$90,000 to the plaintiffs M. P. BARBACHANO and BORDER ELECTRIC & TELEPHONE Co., INC. [Conclusions, Tr. 71-72; Findings, par. XIII at Tr. 82.]

However, whereas these defendants had falsely represented that the construction would cost \$90,000, it actually cost \$144,697.88 which was the true reasonable cost thereof, with the result that plaintiffs, in order to obtain the funds to complete construction, had to turn over to third parties the 80% interest in the Mexican corporation, which defendants would have obtained but for their fraud. [Conclusions, Tr. 71-72.]

Accordingly, whereas under the agreement with defendants, plaintiffs M. P. BARBACHANO and BORDER ELECTRIC & TELEPHONE Co., INC. were entitled to 20% of the stock in plaintiff radio-broadcasting corporation for 20% of the total investment of \$144,697.88, or \$28,939.58, the same 20% of stock cost plaintiffs over \$90,000, or a net

investment loss in excess of \$61,060.42, flowing directly from the fraud of defendants. [Conclusions, at Tr. 75-76: Findings, in par. XVII, at Tr. 86.]

THIS \$61,060.42 OF LOSS TO PLAINTIFFS REPRESENTS PART OF THE TOTAL OF MONEY OBTAINED FROM THE PLAINTIFFS BY THE FRAUD OF DEFENDANTS, FOR THE BENEFIT OF AN ENTERPRISE IN WHICH, BUT FOR THE TERMINATION OF THE AGREEMENT FOR THEIR FRAUD, THESE DEFENDANTS WOULD HAVE CONTINUED TO EXERCISE 80% INTEREST AND CONTROL.

Not content with having induced plaintiffs M. P. BARBACHANO and BORDER TELEPHONE & ELECTRIC Co. to part with over \$90,000, of which over \$61,060.42 was lost by plaintiffs as a direct result of the fraud of defendants, these defendants entered into a conspiracy to inflict, and succeeded in inflicting additional damage on plaintiffs by wrongfully causing plaintiffs' equipment to be attached so as to interfere with completion of the radio station [Conclusions, Tr. 69-70; Findings, par. XV at Tr. 83-85], plus slandering plaintiffs' title to the radio station among advertisers, governmental authorities in the United States and Mexico, banks, chambers of commerce, and so forth, in such a way as to prevent it from commencing normal commercial operations. [Conclusions, Tr. 73-74; Findings, par. XV at Tr. 83, verifying par. XXI, at Tr. 12-13 of the Amended Complaint.] The aforementioned attachment eventually was found by the District Court to have been void from the beginning. [Tr. 85.]

IN CONSEQUENCE OF ALL OF THE FOREGOING FACTS, THE DISTRICT COURT GAVE JUDGMENT FOR PLAINTIFFS AND AGAINST THE DEFENDANTS LAWRENCE W. ALLEN, WILLIS ALLEN, M. F. DEXTER AND CINEMA ADVERTISING AGENCY, IN THE SUM OF \$86,210.42, to wit:

(1) LOSS OF OVER \$61,060.42 RESULTING DIRECTLY FROM THE FRAUD OF DEFENDANTS REPRESENTING INVESTMENT BY PLAINTIFFS ON BEHALF OF THE ENTERPRISE OF PLAINTIFFS AND DEFENDANTS CONTEMPLATED BY THE AGREEMENT. [Conclusions, Tr. 75-76.]

(2) DAMAGE IN THE SUM OF \$10,000 TO PLAINTIFFS FROM DEFENDANTS' CONSPIRACY AND THE WRONGFUL ATTACHMENT FLOWING THEREFROM. [Conclusions, Tr. 76; Findings, Tr. 85-86.]

(3) DAMAGE IN THE SUM OF \$15,150 TO PLAINTIFFS FROM LOSS OF BROADCAST ADVERTISING [Conclusions, Tr. 74-75; Findings, Tr. 86-87], WHICH APPARENTLY INCLUDES DAMAGES FROM PREVENTION OF COMMERCIAL OPERATIONS BY SLANDER OF PLAINTIFFS' TITLE TO THE RADIO STATION, WHICH THE COURT FOUND TO HAVE OCCURRED AS ALLEGED IN PARAGRAPH XXI OF THE AMENDED COMPLAINT. [Conclusions, Tr. 73-74; Findings, Tr. 82-83];

PLUS PLAINTIFFS' COSTS IN THE SUM OF \$343.99.



III.

**Specification of Errors.**

Appellants specify the following errors in the aforesaid Order of the District Court entered October 13, 1950:

(1) The District Court erred in finding that the defendant Willis Allen had been released from the liability of the judgment herein by his discharge in bankruptcy;

(2) The District Court erred in failing to find that the aforesaid judgment for damages in favor of the appellants herein and against the defendants, including appellee Willis Allen, comes within Section 17a of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 550, 11 U. S. C. A. 35, as amended) which provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are liabilities for obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another," and that accordingly the defendant-appellee Willis Allen was not released from the liability of said judgment by his discharge in bankruptcy;

(3) The District Court erred in ordering that the defendant Willis Allen be excepted from the writ of execution ordered to issue against all defendants named in said judgment, and in denying execution upon the judgment as to the defendant Willis Allen.

IV.

Summary of Argument.

1. The decision of the District Court amounts to a rule of law that bankruptcy is a bar to enforcement of a judgment for damages for fraud unless the money or property obtained by fraud from the plaintiff *was received by the bankrupt*.

It is submitted that Section 17a of the Bankruptcy Act does not depend upon receipt of the money or property by the fraudulent bankrupt.

IT IS SUFFICIENT WHERE AS HERE, THE MONEY AND PROPERTY INDUCED FROM PLAINTIFFS WAS INVESTED IN A COMMON ENTERPRISE CONTROLLED BY DEFENDANT AND INTENDED FOR THE MUTUAL BENEFIT OF PLAINTIFF AND DEFENDANTS.

Accordingly, appellants submit that the judgment in favor of plaintiff-appellants comes within the second clause of Section 17a of the Bankruptcy Act with reference to liability for obtaining property by false pretenses or false representations, and that accordingly the bankruptcy of Willis Allen did not avoid his liability for this judgment.

2. Independently of the undischarged liability of Willis Allen for obtaining property by false pretenses or false representations, his liability is likewise excepted from the discharge as being one for "willful and malicious injuries to the . . . property of another . . .," within the meaning of the further language of the same clause of the Bankruptcy Act.

V.

ARGUMENT.

(1) Fraud.

(a) As noted under Statement of the Case above, plaintiffs were obligated by their agreement with defendants to furnish various property on behalf of a common enterprise controlled by defendants, to be incorporated eventually, with defendants owning 80% and plaintiffs 20% of the stock.

The Court found that plaintiffs expended in excess of \$90,000.00 on behalf of the enterprise, of which \$61,-060.42 was lost by plaintiffs, to their damage, in direct consequence of defendants' fraud.

Of the \$90,000.00, the Court found that over \$30,000.00 was expended by plaintiffs before discovery of defendants' fraud and the consequent termination of defendants' interest in the agreement.

The Court also found that plaintiffs were compelled to expend the balance of the \$90,000.00, and thereafter of \$144,697.88 with the aid of funds from third parties, because of the inability of defendants to perform, and the commitments undertaken by plaintiffs in direct consequence of defendants' fraud.

Up to the time when defendants' interest in the enterprise was terminated by reason of their fraud, there is no doubt that,—had defendants performed, and plaintiffs nevertheless refused to form the Mexican corporation and transfer the assets of the enterprise to it, as contemplated by the agreement—defendants would have been entitled as against plaintiffs, to all of the remedies either of partners or joint adventurers, including specific per-

formance to compel creation of the corporation and transfer. *Cf. Gossett v. Schabelitz*, 74 Cal. App. 2d 854, 169 P. 2d 684 (1946), where parties to a common enterprise which contemplated transfer to a corporation, were held liable to each other as joint adventurers upon failure of creation of the corporation contemplated by the agreement.

See also:

*Butler v. Union Trust*, 178 Cal. 195, 172 Pac. 601 (1918);

*Hamer v. MacClatchie*, 220 Cal. 720, 32 P. 2d 620 (1934);

*Oakley v. Rosen*, 76 Cal. App. 2d 310, 173 P. 2d 55 (2nd Dist. 1946);

14 Cal. Jur. 760, Sec. 2.

Far from denying their interest in the common enterprise, defendants including Willis Allen insisted upon it throughout and claimed also that plaintiffs received and held the assets of the enterprise as agents for and trustees of these defendants, and that defendants were entitled to 80% of the stock of plaintiff radio-broadcasting corporation and to an accounting of profits. [See Amended Answer of defendants Lawrence W. Allen, Willis Allen, Cinema Advertising Agency and M. F. Dexter and Counterclaim, filed June 25, 1940, at Tr. 43-48.]

Having done so, and caused plaintiffs to invest in this common enterprise to their damage, defendants cannot be heard now to take advantage of the fact that they were later held by the Court to be estopped by their fraud from claiming an interest in the enterprise. California

Civil Code, Section 3517 ("No one can take advantage of his own wrong.")

ACCORDINGLY, PLAINTIFFS' INVESTMENT ON BEHALF OF THE ENTERPRISE, AT LEAST UNTIL DEFENDANTS CAUSED PLAINTIFF TO TERMINATE THE INTEREST OF DEFENDANTS BECAUSE OF THEIR FRAUD, AND THEREAFTER INSOFAR AS FURTHER INVESTMENT IN THE ENTERPRISE WAS COMPELLED BY COMMITMENTS FLOWING FROM DEFENDANTS' FRAUD, MUST BE HELD TO HAVE BEEN FOR THE BENEFIT OF DEFENDANTS INCLUDING WILLIS ALLEN AS COMMONLY INTERESTED WITH PLAINTIFFS THEREIN.

(b) Section 17a of the Bankruptcy Act (11 U. S. C. A., Sec. 35) does not require that the property obtained by defendant's fraud be obtained *for him*, in order to avoid the bar of bankruptcy.

It is enough that property was obtained, "whether for himself or for anybody else," especially where as here he was beneficially interested.

Thus, in *Re Kunkle*, 40 F. 2d 563 (E. D. Mich. 1930), the bankrupt sought to stay enforcement of a judgment against him because

"the bankrupt did not receive any conveyance of the property alleged to have been fraudulently obtained, but was acting as agent for the other defendants in the state case. Not being in a fiduciary relationship to the petitioners herein, the only question involved in this proceeding now before the court is whether the decree against Kunkle is, in the language of section 17-a of the Bankruptcy Act (11 USCA, sec. 35) a liability for obtaining property by false pretenses or false representation."



In rejecting the bankrupt's motion to stay, the Federal District Court observed:

"The bankrupt contends that section 17-a applies only to a case where the bankrupt himself obtained property for himself by such false pretenses or false representation, and that the intent and purpose of the act was not to permit him to retain such property as against the person defrauded, and at the same time secure through bankruptcy a discharge of the debt or liability arising out of the fraud. This seems to be begging the question. *To adopt the interpretation suggested by the bankrupt would be to rewrite the section so as to read: 'A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . are liabilities for obtaining property (for himself) by false pretenses or false representations.'*" (Italics mine.)

"If that had been the intention of the Congress, the Act would have been so worded. There is no exception contained in or suggested by the act as to liabilities for obtaining property by false pretenses or false representation. It plainly applies to all such obtaining of property by the bankrupt, *whether for himself or for anybody else*. The rule of statutory construction is that, where the language of the statute is plain, it is not susceptible of interpretation, and the letter of the law will prevail." (Italics mine.)

In *Matter of Dunfee*, 219 N. Y. 188, 144 N. E. 52 (1916), plaintiff bonding company paid \$23,561.33 to a third party on the basis of a surety bond issued at defendant's request. Thereupon plaintiff obtained judgment against defendant for \$27,669.53, being the full penalty

of the bond plus interest and costs. The basis of judgment was that the defendant induced plaintiff to issue the bond by false representations as to defendant's worth.

Notwithstanding that the judgment was for damages for fraud, defendant claimed that his subsequent bankruptcy avoided it because he obtained no "property from plaintiff." He also contended that any property paid by plaintiff to the third party was a separate transaction from the one in which plaintiff was induced to issue a bond by defendant's fraud.

In rejecting defendant's contention, the court, which included later United States Supreme Court Justice Cardozo, stated:

"Obtaining the bond by false representations and paying the obligee the amount of the loss, should all be regarded as one transaction, which amounted to obtaining money by false representations within the Bankrupt Law. The Bankrupt Law does not require that the property shall be obtained by the bankrupt at the instant of making the false representations *nor that it shall pass directly to the bankrupt* . . ." (Italics mine.)

In substantially similar circumstances, the Texas Court of Civil Appeals came to the same conclusion:

"We think the statute referred to" (*i. e.*, section 17 of the Bankruptcy Act) "should be liberally construed so as to prevent the discharge in bankruptcy from relieving against a liability which would not exist but for the fraudulent conduct of the bankrupt."

*Gaddy v. Witt*, 142 S. W. 926 (1911) (reh. den.).

In *Hyland v. Fink*, 178 N. Y. Supp. 114 (App. Div. 1919), aff'd 184 N. Y. Supp. 928, App. Div. 1920), defendant similarly sought to use his discharge in bankruptcy in bar of a judgment against him for damages for fraud. He argued that the loan which defendant induced from plaintiff, was made by plaintiff to a third party, and that therefore defendant obtained no property from plaintiff.

In rejecting defendant's argument, the Court noted that the record showed that the loan was to enable the third party to pay interest on a mortgage on his real property, and that defendant was commonly interested with the third party in real estate transactions. The Court concluded:

"If it is shown that the bankrupt derives a benefit from the property obtained he comes within the provisions of the statute in question, *which by its very terms places no limitation as to whom the property is obtained for.*" (Italics mine.)

IT IS SUBMITTED THAT THE RULE THUS STATED BY THE COURTS IN CONSTRUING SECTION 17a OF THE BANKRUPTCY ACT,—BESIDES FOLLOWING THE LITERAL MEANING OF THE ACT—IS IN ACCORDANCE WITH SOUND REASON. FOR THE INJURY TO PLAINTIFF IS THE SAME, AND THE WRONG DONE BY DEFENDANT IS EQUALLY DESERVING OF SANCTIONS, WHETHER THE PROPERTY OBTAINED FROM PLAINTIFF BY DEFENDANTS' FRAUD WENT TO DEFENDANT, OR TO A THIRD PARTY OR TO AN ENTERPRISE IN WHICH HE AND PLAINTIFF WERE COMMONLY INTERESTED.

It should be noted that the courts have reached the same conclusion in construing similar language in subdivision b(3) of Section 32 of 11 U. S. C. A. (36 stat. 839), defining causes for denying discharge in bankruptcy.

This clause as contained in the Bankruptcy Act of 1898, as amended in 1903 (32 stat. 797), provided for denial of discharge in bankruptcy if the bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

*In re Aldridge*, 168 Fed. 93 (N. D., N. Y. 1909), the bankrupt was denied discharge in bankruptcy where he had induced the objecting creditors to sell to a third party upon the false representations of the bankrupt as to his own financial condition.

In affirming denial of discharge the Court stated:

"Again, must the statement be used by the one in whose favor it is written *to obtain the property for himself?* . . .

"It is, of course, possible to construe subdivision 3 of Section 14b of the bankruptcy act as amended to mean that the property must have been obtained by the bankrupt for his own use and benefit, to swell or benefit his own estate . . . but the section does not so read, and would not, in my judgment serve the purpose for which intended should we give it such a narrow and strict construction . . . *The words 'obtained property' and 'obtaining such property on credit' do not mean that the property must have been obtained for the use or benefit of the one obtaining it.*" (Italics mine.)

*Cf. Fidelity & Deposit Company of Maryland v. George C. Arenz*, 290 U. S. 66 (1933).

ACCORDINGLY, TO THE EXTENT THAT THE JUDGMENT INCLUDES \$61,060.42 OBTAINED FROM PLAINTIFFS AS A RESULT OF DEFENDANTS' FALSE REPRESENTATIONS, FOR THE

BENEFIT OF AN ENTERPRISE IN WHICH DEFENDANTS WERE COMMONLY INTERESTED WITH PLAINTIFFS, AND WOULD HAVE REMAINED COMMONLY INTERESTED BUT FOR THEIR OWN FRAUD, PLAINTIFFS SUBMIT THAT IT IS EXCEPTED FROM THE BAR OF WILLIS ALLEN'S VOLUNTARY BANKRUPTCY.

## (2) Wilful and Malicious Injury to Property of Another.

As noted above under STATEMENT OF THE CASE, the record shows that the judgment for plaintiffs includes, besides the \$61,060.42 damages for fraud, a further \$10,000.00 for damages to plaintiffs' property by wrongful attachment stemming from defendants' conspiracy to that end, plus \$15,150.00 for loss of broadcast advertising which includes damages to plaintiffs' property by slander of their title stemming from defendants' conspiracy to that end.

The rule in construing the language of the second clause of Section 17a of the Bankruptcy Act (11 U. S. C. A., Sec. 35), with regard to willful injury to the property of another, is that proof of actual ill will of defendants is not required.

The "malice" which is required, is that which the law implies from the intentional doing of a wrongful act to the injury of another without just cause or excuse.

*In re Greene*, 87 F. 2d 951, 109 A. L. R. 1188 (C. C. A. Ill. 1937);

*Thibodeau v. Martin*, 140 Me. 179, 35 A. 2d 653 (1944).



Thus, intentional conversion of another's property is included within such injury. *Re Northrup*, 265 Fed. 420 (1920); *Bank of Williamsville v. Amherst Motor Sales*, 254 N. Y. Supp. 825 (1932); *McIntyre v. Kavanaugh*, 242 U. S. 138; *In re Stenger*, 283 Fed. 419 (1922); likewise included is one partner's fraudulent appropriation of partnership property at the expense of another, as in *Marlenee v. Warkentin*, 71 Cal. App. 2d 177, 162 P. 2d 321 (1945), and *Fooshe v. Sunshine*, 96 Cal. App. 2d 336, 215 P. 2d 66 (1950); or the intentional violation of another's title to real property by taking possession and ejecting his tenants on the pretense that a sale to the wrongdoer also covered such property, as in *Rees v. Jensen*, 170 F. 2d 348 (C. C. A. 9th, 1948); or a third party's intentional inducement of breach of contract as in *Tinker v. Colwell*, 193 U. S. 473 (1903), and *In re Minsky*, 46 Fed. Supp. 104 (D. C. N. Y. 1942).

Naturally also, liability for damages for slander or libel is not dischargeable.

*In re Dowie*, 202 Fed. 816 (D. C. N. Y. 1912);

*McDonald v. Brown*, 51 Atl. 213, 23 R. I. 546 (1902);

*Parker v. Brattan*, 120 Md. 428, 87 Atl. 756 (1913).

Nor is liability for malicious prosecution.

*In re Stone*, 278 Fed. 566 (D. C. N. Y.);

*In re Snyder*, 280 N. Y. Supp. 257, aff'd 280 N. Y. Supp. 259.

Obviously, slander of title which consists of the false and intentional disparagement, oral or written, of another's title to real or personal property, resulting as in the present case in pecuniary damage, is included within the willful and malicious injury to property of another that is not discharged by bankruptcy.

Likewise, the wrongful and intentional attaching of another's property for the purpose of preventing the latter's enjoyment thereof, as in the present case, comes squarely within the concept of willful and malicious injury to property.

IT IS SUBMITTED, THEREFORE, THAT INSOFAR AS THE JUDGMENT FOR PLAINTIFFS HEREIN IS BASED UPON DAMAGES IN THE SUMS OF \$10,000.00 AND \$15,150.00 FOR DEFENDANTS' INTENTIONAL INTERFERENCE WITH PLAINTIFFS' COMMERCIAL OPERATIONS BY WRONGFUL ATTACHMENT AND DEFAMATION OF PLAINTIFFS' TITLE TO THE RADIO STATION FLOWING FROM DEFENDANTS' CONSPIRACY TO THAT END, IT COMES SQUARELY WITHIN THE MEANING OF THE LANGUAGE OF THE SECOND HALF OF THE SECOND CLAUSE OF SECTION 17A OF THE BANKRUPTCY ACT, DENYING DISCHARGE AS TO "WILLFUL AND MALICIOUS INJURIES TO THE PERSON OR PROPERTY OF ANOTHER."

VI.

Conclusion and Request for Relief.

Appellants therefore respectfully request that this Court grant relief to appellants as follows:

(1) Setting aside those parts of the Order of the District Court below entered on October 13, 1950 [Tr. 142-143] which find that the defendant WILLIS ALLEN was released from the liability of the judgment herein by his discharge in bankruptcy, and which ordered that said defendant be excepted from the execution otherwise granted against all defendants named in said judgment;

(2) Causing said Order to be amended to include a finding that the defendant-appellee WILLIS ALLEN was not released from the liability of the judgment by his subsequent discharge in bankruptcy for the reason that said judgment is one for obtaining property by false pretenses or false representations and for willful and malicious injury to the property of another within the meaning of Section 17a of the Bankruptcy Act (11 U. S. C. A. 35);

(3) Causing said Order to be amended to include the aforesaid defendant-appellee WILLIS ALLEN within the writ of execution ordered to be issued upon the judgment herein.

Respectfully submitted,

LEONARD HORWIN,

*Attorney for Appellants.*



No. 12759

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

M. P. BARBACHANO, *et al.*,

*Appellants,*

*vs.*

LAWRENCE W. ALLEN, *et al.*,

*Appellees.*

---

## APPELLEES' BRIEF.

---

LAWRENCE W. ALLEN,  
1204 South Hill Street,  
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FILED

MAY 4 1951

PAUL P. O'BRIEN,

CLERK





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No. 12759  
IN THE  
**United States Court of Appeals**  
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*Appellants,*

*vs.*

LAWRENCE W. ALLEN, *et al.*,

*Appellees.*

---

**APPELLEES' BRIEF.**

---

**I.**

**Statement of the Issues Involved in This Appeal.**

Appellants have taken this appeal upon two points of law. Only one of these points was raised in or ruled upon by the court below, presided over by Judge Westover. Under long recognized rules, a question of law which was not presented to nor passed upon by the trial court cannot be raised for the first time upon appeal.

(1) The first point, and we believe the only point properly raised upon this appeal, is appellants' contention that where damages have been awarded to them as the plaintiffs in an action for damages for fraud, a subsequent discharge in bankruptcy of defendant Willis Allen will not release the bankrupt from the debt.

(2) The second point presents a question not presented in the trial court and which is now raised for the first time on this appeal. Appellants having lost in the court below on the first point, now come to this court with a warming over of their arguments on the first point and the following new contention: That in the \$86,554.41

judgment awarded to plaintiffs against the defendants for damages for fraud there is included the sum of \$15,150 damages for wilful and malicious injuries to person or property and that therefore the discharge in bankruptcy did not release the bankrupt from such portion of the judgment.

## II.

### Summary of Argument.

(1) On the first point, the court below sustained the contention of defendant Willis Allen that his discharge in bankruptcy released him from the debt of the judgment even though the judgment was for damages for fraud. The ruling was based upon the court's finding that neither the defendant Willis Allen nor any of the defendants ever obtained any money or property from the plaintiffs. Plaintiffs admitted that the defendants never obtained money or property from the plaintiffs but contended that plaintiffs had invested money and property in a common enterprise controlled by defendants and intended for the mutual benefit of plaintiffs and defendants thus constituting the plaintiffs and defendants partners or joint adventurers. In answer to this contention, the court below found that the facts did not support such claim. Among the facts disclosed by the entire record in the case it was pointed out to the appellants by both the court and opposing counsel that:

(a) the record showed clearly that neither the bankrupt nor any of the defendants had ever received any money or property, either real or personal, from the plaintiffs;

(b) that all of the expenditures made by the plaintiffs had been made for the improvement of their own prop-

erty and on plaintiffs' own behalf and for plaintiffs' own benefit;

(c) that Willis Allen or none of the defendants had ever received any benefit directly or indirectly or the use of any expenditure made by the plaintiffs;

(d) that the plaintiffs made no transfer of money or property to anyone at defendants' request with the exception of the \$1700 paid to the Mexican government for the issuance of the radio station concession to M. P. Barbachano, and that this \$1700 was paid by plaintiffs with money furnished to the plaintiffs by the defendants for that purpose;

(e) that plaintiffs assumed no obligations to the Mexican government or otherwise to build the radio station prior to the time the plaintiffs rescinded their contract with the defendants; that plaintiffs assumed the obligation to the Mexican government to build the radio station by depositing a bond with that government on Oct. 5, 1936, and on that same day served notice on defendants of rescission of their contract. [Tr., top and bottom of p. 68.] That any and all expenditures of plaintiffs in regard to the construction of the radio station were for plaintiffs' own account and not for the benefit of the defendants, and were of plaintiffs' own volition;

(f) that the defendants never exercised, and were never permitted by the plaintiffs to exercise, any control over any money or property belonging to any of the plaintiffs, nor did anyone else do so because of any request of the defendants upon the plaintiffs;

(g) it was clear that defendants had no control or ownership in the radio station constructed by the plaintiffs because the record showed that plaintiff M. P. Barbachano as owner of the concession, radio station and ap-

purtenances transferred the same to a Mexican Corporation in consideration of the issuance to him of all of the capital stock of the corporation [Tr., last par. on p. 70 and first five lines on p. 71];

(h) said corporation was not the corporation called for in the contract between plaintiffs and defendants. [Tr., p. 24, par. 9.]

(2) On the second point in appellants' argument, raised here for the first time, namely appellants' contention that a portion of plaintiffs' judgment against defendants was for wilful and malicious injuries to person or property and therefore was not released by the discharge in bankruptcy, it should be sufficient answer to call to this Court's attention the long established rule of this Court that it will review only those rulings made by the trial court on questions brought to its attention and passed upon by it.

Appellants made no contention in the court below that the discharge in bankruptcy of defendant Willis Allen did not release him from the obligation of the judgment because a portion of the total amount of the judgment was for wilful and malicious injuries to person or property. Such claim now made on appeal for the first time, is pure afterthought.

For appellants to raise such a question on appeal for the first time is unfair to appellees; it deprives them of the opportunity of referring to portions of the record not included in the transcript. Also it deprives appellees of the opportunity to introduce extrinsic evidence in accordance with the rule permitting such evidence as laid down in *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d 127, 177 P. 2d 364.

For the appellants to raise for the first time on appeal a question of law or fact not presented to nor passed upon

by the trial court is not only unfair to the appellees, but also it is unfair to the appellate court and to the trial court, for obvious reasons.

But wholly aside from the foregoing considerations, appellants' new point has no merit. A close inspection of the Transcript shows clearly that the \$15,150 portion of the judgment which appellants now belatedly claim was an award for slander of title, is not that at all, but actually is instead a carefully and meticulously calculated award of damages for loss of radio station advertising time. [Tr., last par. on p. 74 extending down to the middle of p. 75; and also p. 87 last line thereof.]

And the \$10,000 portion of the judgment which appellants now claim to be an award for injury to personal property, to-wit, to the radio station equipment which was said to be wrongfully attached, upon closer inspection turns out to be merely an award of special damages awarded to plaintiffs, not to compensate them as claimed for wilful and malicious injury to the radio equipment which was attached, but instead was to compensate plaintiffs for "a loss in the additional sum of \$10,000 expended by the latter, as aforementioned, in order to procure the reinstatement of said concession after the Mexican government had declared the same to have become void and terminated;" . . . because of delay in station construction occasioned by the attachment. There was no actual injury to the attached radio equipment, nor was there any allowance of damages therefor. [Tr., p. 76, first par. commencing on that page.] [Also Tr., p. 84, first 12 lines.]

Neither of the foregoing portions of the damages awarded to appellants come within the exceptions specified by the statute, and hence were released by the discharge in bankruptcy. (11 U. S. C. A. 35, Ch. III, Sec. 17.)



III.  
ARGUMENT.

(1) Fraud.

“Fraud” is a harsh word, and it is only fair, in justice to the Appellees, to note that an examination of even the small portion of the record appearing in the Transcript discloses that the defendants never obtained money or property from the plaintiffs by false pretenses or false representations, or at all.

The supposed fraud consisted in alleged representations as to the financial ability of the defendants to carry out the contract to erect and operate a radio station in Mexico. The record discloses that there was no false written financial statement; the only proof was the word of one witness against another as to what was said about defendants’ financial ability prior to the entry into the contract. The adverse decision is one about which volumes could be written—but not here.

Appellants’ brief labors to create the impression that appellees benefited from the expenditures made by the appellants, even though it is reluctantly admitted that appellees obtained no money or property from the appellants.

However, after spending some considerable time in an examination of the files and records in the case, and after listening to the arguments of counsel for both sides, the court below in ruling against appellants on the motion, pointed out to the appellants the reasons for his ruling. Among those reasons were the following:

(a) neither the bankrupt Willis Allen nor any of the defendants had ever received any money or property from the plaintiffs;

(b) all of the expenditures made by the plaintiffs had been made for the improvement of their own property, for their own benefit, and of their own volition;

(c) that Willis Allen or none of the defendants had directly or indirectly received any benefit or use of any expenditures made by the plaintiffs;

(d) that none of plaintiffs' expenditures had been made at the request of the defendants either on behalf of the defendants or on behalf of any other person;

(e) that the plaintiffs had made no transfer of money or property to anyone at defendants' request with the exception of the \$1700 paid to the Mexican government for the issuance of the radio station concession to Manuel P. Barbachano, and that this \$1700 was paid by plaintiffs with money furnished to the plaintiffs by the defendants;

(f) that the plaintiffs were not compelled to build the radio station merely because the defendants breached their agreement to construct it;

(g) that the plaintiffs were never bound to the Mexican government to erect the radio station in accordance with the concession until such time as the plaintiffs posted bonds therefor with the Mexican government, and that at the time of the posting of such bonds by the plaintiffs, the plaintiffs knew of their own intention to rescind their contract with the defendants on that very same day on which the bonds were posted. In addition, plaintiffs knew at the time they posted the bonds that the defendants had declined to post them; that therefore the enterprise which the plaintiffs undertook, to build the radio station, was entirely on their own account and for plaintiffs' sole benefit; that the enterprise was not a partnership affair and that the plaintiffs and defendants were not joint adventurers;

(h) that the defendants were never permitted to exercise any control over any money or property belonging to any of the plaintiffs; nor did any other person exercise any such control because of any request by the defendants upon the plaintiffs;

(i) that the defendants never had any control, possession or ownership in the radio station is evidenced by the record which shows that plaintiff M. P. Barbachano as owner of the concession and radio station and appurtenances transferred the same to a Mexican corporation in consideration of the issuance to him of all of the capital stock of the corporation [Tr., last par. on p. 70 and first five lines on p. 71];

(j) this corporation was not the corporation mentioned in the contract between plaintiffs and defendants. [Tr. p. 24, par. 9.]

Upon the basis of the foregoing reasons, the court below ruled that Willis Allen having subsequently received a discharge in bankruptcy had been thereby released from the liability of the judgment.

Appellees believe the ruling was correct, and cite herewith a few of many authorities which uphold the decision:

(a) The Bankruptcy Act states: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as are liabilities for obtaining money or property by false pretenses or false representations . . .

11 U. S. C. A. 35, Chap. III, Sec. 17.

(b) By express provisions of the Act, there is excepted from the operation of a discharge a liability for obtaining property by false pretenses or false representa-

tions, obligations of this nature surviving the discharge thereunder. For the liability to come within this provision of the Act, it must appear:

- (a) that the bankrupt has made false representations,
- (b) that these false representations were made with the intention of defrauding the creditor,
- (c) that the creditor relied upon and was misled by the false representations,
- (d) and that property or money was obtained as a result thereof.

If any one or more of these elements are lacking, the obligation will not survive the discharge in bankruptcy.

8 C. J. S., Bankruptcy, Sec. 573, at pp. 1513, 1514.

(c) "Not all frauds come within this exception to the operation of a discharge. It is only fraud in obtaining property by false pretenses or false representations which prevents the release of the bankrupt from the liability based thereon."

8 C. J. S., Bankruptcy, Sec. 573, p. 1516.

(d) *Zimmerman v. Blount*, 238 Fed. 740, quoting from the syllabus, says: "Though a fraud may be committed in ways other than by false representations and still be actionable, it is only fraud by obtaining property by false pretenses or false representations which prevents the release of the bankrupt from his provable debts under the Bankruptcy Act of July 1, 1898."

(e) Debts Not Affected by Discharge in Bankruptcy. "In order to establish the liability of the bankrupt for such debt, the elements of the transaction must amount

to obtaining property by false pretenses or false representation." 4 Cal. Jur., Bankruptcy, Sec. 32, p. 86.

(f) Obtaining Property as Prerequisite. "The bankrupt must have obtained property for himself, or as agent, or have benefited therefrom, to bring him within the exception. . . . It is essential, of course, that property should have been obtained by the bankrupt as a result of the false representations, either for himself, or as agent for another." 8 C. J. S., Bankruptcy, Sec. 573, p. 1518.

(g) Reason for Rule. "We assume, in the consideration of the question, that Congress intended the language of the statute to be understood in its ordinary significance, and that the purpose of the law was to prevent the bankrupt from retaining the benefits of property acquired by fraudulent means." 8 C. J. S., Bankruptcy, Sec. 573, p. 1518, quoting from *Rudstrom v. Sheridan*, 142 N. W. 313, 122 Minn. 262.

(h) Burden of Proof. The burden of proof that a debt comes within an exception provided by Sec. 17 of the Bankruptcy Act rests upon the creditor. A creditor who would avoid the effect of a discharge in bankruptcy as to a judgment held by him against the bankrupt has the burden of proof that the note or obligation upon which the judgment was taken was an exception to the discharge. 6 Am. Jur., Bankruptcy, Sec. 810 and Sec. 813 (citing *Kreitlein v. Ferger*, 238 U. S. 21, 59 L. Ed. 1184, 35 S. Ct. 685).

(i) Determination of Character of the Judgment Held by Plaintiffs. In ascertaining whether a liability on a judgment was discharged in bankruptcy, the court will



go behind the judgment, examine the entire record, and determine therefrom the nature of the original liability, and, when necessary, extrinsic evidence will be received for the purpose of determining the character of the debt. *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d 127, 177 P. 2d 364.

“In determining whether the collection of the judgment, indicating that it was based upon fraud and deceit is barred by debtor’s discharge in bankruptcy, the language of the original judgment is not controlling as to either party, but the record must be examined to determine the true nature of the acts upon which the judgment was based.” *Tudryck v. Mutch* (1948), 30 N. W. 2d 512, 320 Mich. 86.

Appellees have no quarrel with any of the law enunciated in the cases cited by appellants in their opening brief herein. But, contrary to the impression which appellants have labored to create, the court below did not hold, and the appellees have never contended, that money or property obtained by fraud must be obtained for the bankrupt himself to avoid the rule that a subsequent discharge in bankruptcy will release the debt.

There can be no doubt that if a bankrupt is benefited by reason of money or property which a creditor transfers to a third person at the request of the bankrupt or for the benefit of the bankrupt, the effect is the same as if the money or property had been received by the bankrupt himself.

*In re Kunkel*, 40 F. 2d 563, cited by appellants, merely holds that Kunkle, acting as agent for other defendants, obtained property for his principal by false and fraudu-



lent representations, and therefore Kunkle's discharge in bankruptcy was no bar to a suit for the recovery of the property. But there is no application of such facts to the case at bar. Willis Allen did not obtain any money or property from the plaintiffs either for himself or as agent for any principal. Immediately after the radio station concession was issued by the Mexican government to Manual Barbachano, Willis Allen demanded that Barbachano turn over the concession to a corporation specified in the contract—a corporation in which Willis Allen's nominees would have owned 80% of the stock. But Barbachano refused, rescinded his contract with defendants, and partially built the radio station out of his own funds on his own property and later transferred the entire station to a Mexican corporation in exchange for all of its capital stock. This was not the corporation contemplated and called for in the contract, but instead was a corporation in which the court found that neither Willis Allen nor any of the defendants ever owned any interest. The transfer was made by Barbachano in furtherance of a plan of his own with which Willis Allen had no connection whatsoever, either as agent or principal or beneficiary.

In *Matter of Dunfee*, 219 N. Y. 188, cited by appellants, a surety company became surety on Dunfee's bond, at his request. Later, when the surety company paid the bond, the effect was the same as if the money had been paid to Dunfee, because the obligation which the surety company paid was Dunfee's obligation. Naturally, such an obligation was not cancelled by Dunfee's discharge in bankruptcy; it was proven that Dunfee had made false

representations as to his financial standing in obtaining the bond.

But in the case at bar, appellants have not paid off any obligation for the benefit of appellees.

In *Gaddy v. Witt*, 142 S. W. 926, cited by appellants, Witt was induced by false representations to become a guarantor of J. Homer Gaddy's indebtedness to a bank. J. Homer Gaddy defaulted and attempted to discharge his obligation by bankruptcy. But it was held that Witt having paid J. Homer Gaddy's indebtedness to the bank could still maintain his action against Gaddy because Witt's signature to the guaranty was obtained by fraud.

But in the case at bar, the sums paid out by the plaintiffs to build the radio station were not paid out for the benefit of Willis Allen, nor were they paid at his request, with the exception of \$1700 paid by Manuel Barbachano to the Mexican government for the issuance of the concession and this sum was paid by Barbachano out of money supplied by Willis Allen and the other defendants for that purpose. All of the remaining sums paid out by the plaintiffs for the construction of the station were paid out for the construction of the radio station for their own account, not for the account or benefit of the defendants.

In the remaining three cases cited by appellants on this point, *Hyland v. Fink*, 178 N. Y. Supp. 114; *In re Aldridge*, 168 Fed. 83; *Fidelity & Deposit v. Arenz*, 290 U. S. 66, the ruling was the same, for the same reasons as in the three cases above reviewed, so there is no point in taking up these cases individually. None of these cases bolster appellants' objections to the ruling in the court below.

(2) Wilful and Malicious Injuries to Person or Property of Another.

- (a) A Question of Law Which Was Not Presented to nor Passed Upon by the Trial Court Cannot Be Raised Upon Appeal.

In the court below, no mention was ever made by the pleadings, by counsel for either side, or by the Court, of wilful and malicious injuries to person or property. That point of law is raised in this appellate court for the first time.

The one and only question which is involved on this appeal which was presented to and ruled upon by the court below is the following: Does the discharge in bankruptcy of defendant Willis Allen operate to release said bankrupt from the debt of a judgment for damages for fraud where it was shown that the bankrupt, whether acting for himself or on behalf of or as agent for another, had never at any time obtained any money or property from the judgment creditor for himself or for a third person and where it was also shown that neither the bankrupt nor any of the other defendants had benefited in any way either directly or indirectly from any of the expenditures made by the judgment creditors?

No other point of law was raised below, and plaintiffs themselves framed that single issue by their own pleadings on their motion.

Plaintiffs' pleadings in the court below, on the motion, consisted of the notice of motion, the affidavits of Leonard Horwin, Cleveland B. Swift, William B. Rabow, and of plaintiffs' Memorandum of Points and Authorities.

Horwin's affidavit recites:

"On or about October 18, 1941, the Court, by the Honorable Harry Holzer, deceased, entered judgment herein against the defendants, including judgment for *damages for their fraud* in the sum of \$86,210.42. . . ." (Emphasis added.) [Tr. p. 112.]

Further along in the same affidavit we find:

"That notwithstanding the bankruptcy of Willis Allen in 1943 and in accordance with the law applicable thereto, said Willis Allen continues liable along with the other defendants for the judgment herein, *which is for fraud*; . . ." (Emphasis added.) [Tr. p. 115.]

Plaintiffs' Memorandum of Points and Authorities, paragraph 6, recites:

"Enforcement of *judgment in damages for fraud* is not barred by bankruptcy of the judgment debtor, and filing proof of claim in bankruptcy proceedings is not waiver of *claim for fraud*." (Emphasis added.) [Tr. p. 127.]

Nowhere in plaintiffs' pleadings is there any mention or claim that plaintiffs' judgment was for anything but damages for fraud.

There was absolutely no issue or point of law raised in the court below to claim that a portion of the judgment was not for fraud but instead was for wilful and malicious injuries to person or property and therefore survived bankruptcy.

This Honorable Court has consistently followed its own rule that issues or questions not raised in or presented to the trial court will not be considered in the reviewing court.

In *Ex parte Keizo Kamiyama*, 44 F. 2d 503, 505 (1930), Justice Wilbur observed:

“It is a fundamental rule in the review of judicial proceedings that a party is not heard on appeal upon questions not raised in the trial court. 3 C. J. 689, sec. 580; *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234; *Rodriguez v. Vivoni*, 201 U. S. 371, 26 S. Ct. 475, 50 L. Ed. 792; *Huse v. U. S.*, 222 U. S. 496, 32 S. Ct. 119, 56 L. Ed. 285 . . .”

In *Hecht v. Alfaro*, 10 F. 2d 464 (1926), Justice Gilbert said:

“We can review only rulings made by the trial court on questions brought to its attention and passed upon by it. *Oregon R. & Nav. Co. v. Dumas*, 181 Fed. 781, 104 C. C. A. 641; *Bort v. E. H. McCutchen & Co.*, 187 Fed. 798, 109 C. C. A. 558; *U. S. v. Nat. City Bank*, C. C. A., 281 Fed. 754. These considerations are sufficient to dispose of the case upon the writ of error from this court.”

In *Century Furniture Co. v. Bernard's, Inc.*, 82 F. 2d 706, 707 (1936), Justice Haney said:

“The various questions of law attempted to be raised cannot be considered by us because such legal propositions were not properly raised in the trial court . . . To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them.”

*Fleishman Const. Co. v. U. S.*, 270 U. S. 349, 356, 46 S. Ct. 284, 70 E. Ed. 624.



Other cases, from this and other courts, on this same point are:

*Parrott Estate Co. v. McLaughlin*, 89 F. 2d 188, which holds that the theory on which the case was tried in the lower court should be the theory considered on appeal.

*Rees v. Lombard*, 21 F. 2d 276, which holds that parties cannot on appeal submit their case on a different theory from that on which it was tried.

*Preston v. Sutro Baths*, 106 P. 2d 16, 41 Cal. App. 2d 148, holds that questions raised in briefs on appeal, but not presented by pleadings or proof, need not be considered.

*Union Oil Co. of Cal. v. Union Sugar Co.*, 173 P. 2d 700, holds that an appellate court will consider only such points as were raised in the trial court.

*Madison v. Octane Oil Co.*, 154 Cal. 768, 99 Pac. 176, holds:

“A case will not be reviewed on a theory different from that on which it was tried below.”

The following cases have made like holdings: *Maxwell v. Jimeno*, 89 Cal. App. 612, 265 Pac. 885; *Perry v. A. Paladini*, 89 Cal. App. 275, 265 Pac. 580; *Schneider v. Henly*, 61 Cal. App. 758, 215 Pac. 1036; *Furlong v. White*, 51 Cal. App. 265, 196 Pac. 903.

To permit appellants to raise this new point of law on appeal for the first time would be unfair to appellees because it would deprive them of the opportunity of referring to portions of the record not included in the transcript.

Also it would deprive the appellees of the right to introduce extrinsic evidence in accordance with the rule per-



mitting such evidence as laid down in *Fitzgerald v. Herzer* (1947), 78 Cal. App. 2d 127, 177 P. 2d 364.

And last, but not least, if appellants were permitted to raise for the first time on appeal a question of law not presented to nor passed upon by the trial court, it would be not only unfair to the appellees, but also it would be unfair to the appellate court and to the trial court, for several obvious reasons.

**(b) Appellants' Newly Raised Point Is Without Merit.**

Appellees submit that the above mentioned considerations should dispose of this point. However, even so, appellants' newly raised point has no merit. A close inspection of the Transcript shows clearly that the \$15,150 portion of the judgment which appellants are now belatedly claiming was an award for slander of title, is not that at all, but actually is instead a carefully and meticulously calculated award of damages for loss of radio broadcast advertising time [Tr. p. 74, last paragraph, extending down to the middle of p. 75; and also p. 87, last line thereof].

And the \$10,000 portion of the judgment which appellants for the first time on this appeal claim to be an award for injury to personal property, to-wit, to the radio station equipment which was said to be wrongfully attached, upon closer inspection turns out to be merely an award of special damages awarded to plaintiffs, not to compensate them as claimed for wilful and malicious injury to the radio equipment which was attached, but instead was awarded to plaintiffs to compensate them for "a loss in the additional sum of \$10,000 expended by the latter, as aforementioned, in order to procure the reinstatement of

said concession after the Mexican government had declared the same to have become void and terminated:" . . . because of delay in station construction occasioned by the attachment. There was no actual physical damage or injury to the attached radio equipment while it was in the custody of the deputy United States marshal, nor was there any allowance of damages therefore [Tr. p. 76, first paragraph commencing on that page; also p. 84, first 12 lines].

Neither of the foregoing portions of the damages awarded to appellants come within the exceptions specified by the statute, hence they were released by the discharge in bankruptcy. (11 U. S. C. A. 35, Chap. III, Sec. 17.)

It is abundantly clear that no award of ordinary damages for the wrongful attachment was made, for the following reason: The proper and recognized measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention. This measure of damages is stated in one of the leading cases on this subject in California, in *Atlas Dev. Co. v. Nat. Surety Co.*, 190 Cal. 329, 212 Pac. 196. The amount of such ordinary damage was manifestly negligible, and no award therefor was made by the court. But in response to plaintiffs' prayer for special damages which were specially pleaded, \$10,000 was awarded to compensate plaintiffs for their expenditure of that sum of money in reinstating the concession after it had been cancelled by the Mexican government for failure to complete the construction within the time allowed therefore, the delay having been occasioned by the wrongful attachment. [Tr. p. 76, first paragraph commencing on that page; also p. 84, first 12 lines.]

Therefore, it is clear that the \$10,000 portion of the judgment referred to by appellants as having been an award of damages for wilful and malicious injuries to person or property, is not that after all, but instead is only an award of special damages arising because of the wrongful attachment.

In passing, however, it may be observed that possibly no award of ordinary damages was made, however small that award might be, for another reason—namely, appellants' own wrong doing in regard to the attachment. While such attachment was in effect, one or more of the appellants was a party to causing the deputy United States marshal and caretaker to become intoxicated, and while he was in such condition the appellants caused the attached radio equipment to be removed and spirited out of the country and across the line into Mexico. For this exploit one or more of the appellants served a term in jail in Los Angeles for contempt of court. These considerations do not appear in the record now before the court, but that is where the trail leads once consideration is undertaken of issues and points not presented in the court below.

#### IV.

#### Conclusion.

Appellees respectfully request of this Court that the ruling of the lower court be affirmed.

Respectfully submitted,

LAWRENCE W. ALLEN,

*Attorney for Appellees.*

No. 12759

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

M. P. BARBACHANO, *et al.*,

*Appellants,*

*vs.*

LAWRENCE W. ALLEN, *et al.*,

*Appellees.*

---

Reply Brief of Appellants M. P. Barbachano and the  
Border Electric and Telephone Co., Inc., a Cor-  
poration.

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MAY 14 1957

PAUL S. O'BRIEN,  
CLERK



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No. 12759  
IN THE  
**United States Court of Appeals**  
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*vs.*

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Reply Brief of Appellants M. P. Barbachano and the  
Border Electric and Telephone Co., Inc., a Cor-  
poration.

---

**Statement of Issues.**

The BRIEF of WILLIS ALLEN raises the following is-  
sues:

(1) He claims that he did not benefit from appellants' investment of money and property induced by his fraud, and therefore does not come within the exception of Section 17a of the Bankruptcy Act (11 U. S. C. A., Sec. 35), viz. "liabilities for obtaining property by false pretenses or false representations . . ."

(2) He claims that appellants "made no contention in the court below" that \$10,000 and \$15,150 respectively out of the total judgment of \$86,210.42 plus costs in their favor was for "wilful and malicious injuries to the person or property of another" within the meaning of Section

17a of the Bankruptcy Act. He therefore urges that this point may not be raised on appeal.

(3) He claims finally that if the foregoing point is properly raised in this appeal, the mentioned damages of \$10,000 and \$15,150 do not come within the meaning of the stated language of Section 17a.

### ARGUMENT.

#### (1) Did Willis Allen Benefit From Appellants' Investment of Money and Property Induced by Willis Allen's Fraud?

(a) At pages 2 to 4 and 6 to 8 of WILLIS ALLEN'S brief, he refers to alleged statements or findings of the court below to the effect that WILLIS ALLEN did not benefit from the investment by appellant's induced by ALLEN'S fraud.

This is not a correct statement of the record. The sole finding of the trial court on this subject is contained in the following language of its ORDER [Tr. 143\*]:

"The Court finds that subsequent to entry of said judgment defendant, Willis Allen, filed a petition in bankruptcy in which petition said judgment was listed; that thereafter said Willis Allen received a discharge in bankruptcy and has been thereby released from the liability of the judgment."

Neither did the court below make the statements asserted by appellee—assuming for the moment that comments of the court below, not in the record, would have any place on appeal.

---

\*Tr. means Transcript of Record.

The sole hearing on the motion for enforcement of the judgment occurred on July 3, 1950 [Tr. 142], at which time WILLIS ALLEN served and filed [Tr. 141] his Affidavit in Opposition to Plaintiffs' Motion for Enforcement of Judgment, etc. *wherein the alleged bar of his discharge in bankruptcy was raised by him* [Tr. 130] *for the first time.*

Accordingly, the court below asked that the parties refrain from argument at this hearing on the issue regarding the alleged bar of bankruptcy and exceptions thereto, and that the entire matter be canvassed by both sides on briefs [Tr. 143]. This was done, and the ORDER of the court was made without further hearing.

There is therefore no basis in the Transcript of Record or in fact, for appellee WILLIS ALLEN's listing of purported statements or findings of the court below as given in his Brief.

(b) At page 11 of his BRIEF, appellee admits:

“Appellees have no quarrel with any of the law enunciated in the cases cited by appellants in their opening brief herein. . . . There can be no doubt that if a bankrupt is benefited by reason of money or property which a creditor transfers to a third person at the request of the bankrupt or for the benefit of the bankrupt, the effect is the same as if the money or property had been received by the bankrupt himself.”

ACCORDINGLY, TO THE EXTENT THAT THE JUDGMENT INCLUDES \$61,060.42 OBTAINED FROM APPELLANTS AS A RESULT OF APPELLEE'S FALSE REPRESENTATIONS, FOR THE BENEFIT OF AN ENTERPRISE IN WHICH HE WAS COMMONLY INTERESTED WITH APPELLANTS, AND WOULD HAVE RE-

MAINED COMMONLY INTERESTED BUT FOR HIS OWN FRAUD, APPELLANTS SUBMIT THAT IT IS EXCEPTED FROM THE BAR OF WILLIS ALLEN'S VOLUNTARY BANKRUPTCY.

(i) In answer, appellee claims, first, that appellants' investments were made for their own benefit, rather than for the common enterprise contemplated by the agreement of March 30, 1936, in which defendants controlled an 80% interest.

The trial court found that from March 30, 1936, to October 5, 1936, when the agreement was terminated for fraud of the defendants including that of appellee WILLIS ALLEN, appellants duly performed their part of the agreement including investments in that period of around \$30,000 pursuant thereto. [See citations to Transcript of Record, as contained from the middle of p. 5 to top of p. 6, of Appellants' Opening Brief.]

According to paragraph 5 of the agreement [Tr. 23], *these investments (viz. "suitable buildings and grounds to house the transmitter and studios, the use of suitable land for towers for new antenna; . . . your services in obtaining the license or concession from the government" etc.) were being furnished by appellants to "us", that is to say, to defendants including WILLIS ALLEN; and paragraph 9 of the agreement provided that defendants would own 80% of the stock in the corporation to be constituted to take over the enterprise.*

The trial court found that the appellants performed the agreement not only in regard to these investments, but likewise "all the other terms and conditions required by them, or any of them, to be performed un-

der said agreement" [par. XI of plaintiffs' Amended Complaint at Tr. 7, found to be true in par. VIII of the trial court's Findings and Conclusions of Law at Tr. 79-80]. Besides the detail conclusions to the same effect in its Memorandum of Conclusions [Tr. 67-68, 63, 62], the trial court found [Tr. 79-80]:

"that in addition to procuring the concession for radio station and providing the suitable lands, buildings and electrical power facilities therefor and otherwise performing the terms and conditions of the contract annexed to plaintiffs' Amended Complaint as Exhibit 'A', plaintiffs caused radio station XEAQ at Rosarito Beach, Mexico, to be removed on or about July 19, 1936, in order to enable defendants to use the site thereof for construction of the new radio station, pursuant to said contract."

SINCE ALL OF THESE INVESTMENTS BY APPELLANTS WERE BEING MADE PURSUANT TO THE AGREEMENT, AND THE AGREEMENT CALLED FOR THEM TO BE MADE FOR "US", VIZ. DEFENDANTS INCLUDING APPELLEE WILLIS ALLEN, WHO WERE ALSO ENTITLED THEREBY TO 80% OF THE CORPORATION WHICH WAS TO TAKE OVER THE ENTERPRISE, SAID INVESTMENTS WERE CLEARLY FOR THE BENEFIT OF DEFENDANTS AS WELL AS PLAINTIFFS.

Appellee WILLIS ALLEN should not be permitted to take advantage of his own wrong, by arguing now that because the trial court eventually excluded him and his confederates from the common enterprise because of their fraud, that therefore the investments of appellants were not for his benefit.



(ii) Appellee argues, next, that the investments made by appellants after October 5, 1936, which was the date of termination of the agreement because of the fraud of the defendants, were not required by the concession from the Mexican Government previously obtained by appellants, and were therefore volunteered for their own benefit.

Suffice it that the trial court found directly to the contrary. Besides the detail in its Memorandum of Conclusions [Tr. 71, 71-72], the trial court in Paragraph XIII of its Findings and Conclusions of Law [Tr. 82], found to be true the following allegations of paragraph of the Amended Complaint [Tr. 11]:

“By reason of said failure and refusal of defendants to perform said agreement *and to comply with the conditions of said concession, as aforesaid, plaintiffs were compelled to* and they did subsequent to on or about October 5, 1936, and up to on or about February 15, 1940, construct and complete said radio station at a cost of approximately \$120,000.00, in addition to the cost of buildings, lands and electrical facilities hereinabove described, which cost of approximately \$120,000.00 was at all of said times and now is the reasonable cost of construction and completion of said radio station.” (Note: The only exception to the foregoing was that the trial court in said Paragraph XIII found that the actual and reasonable cost of construction was \$144,697.88.)

It should also be noted that appellee's statement that the concession was not in effect until deposit of the bond on October 5, 1936, which was the date of termination of the agreement for defendants' fraud, is not accurate. The trial court stated [Tr. 63] in its Memorandum of Conclusions:

"It further appearing that under the Mexican law said concession, although bearing date of August 31, 1936, *was effective as of the date of its delivery, to wit, September 19, 1936*, and under the terms and conditions of said concession and the law of Mexico said concession would have become void in the event of failure to deposit with the Mexican government 11,000 pesos or a bond in that amount *within fifteen days after the effective date of said concession.* . . ."

The Findings and Conclusions of the trial court are to the same effect [par. IX at Tr. 80].

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE RECORD NECESSITATES THE CONCLUSION THAT \$61,060.42 OUT OF THE TOTAL JUDGMENT FOR APPELLANTS IS FOR MONEY OR PROPERTY OBTAINED FROM APPELLANTS BY REASON OF THE FRAUDULENT INDUCEMENT OF DEFENDANTS INCLUDING WILLIS ALLEN, FOR THE BENEFIT OF SAID DEFENDANTS AS WELL AS OF APPELLANTS, AND IS THEREFORE EXCLUDED UNDER SECTION 17A OF THE BANKRUPTCY ACT FROM THE EFFECT OF WILLIS ALLEN'S VOLUNTARY DISCHARGE IN BANKRUPTCY.

(2) Did Appellants Raise in the Court Below Their Contention That \$10,000 and \$15,150 Respectively Out of the Total Judgment of \$86,210.42 Plus Costs in Their Favor, Was for "Wilful and Malicious Injuries to the Person or Property of Another" Within the Meaning of Section 17a of the Bankruptcy Act?

(a) Appellee states:

"Appellants made no contention in the court below that the discharge in bankruptcy of defendant Willis Allen did not release him from the obligation of the judgment because a portion of the total amount of the judgment was for wilful and malicious injuries to person or property. Such claim now made on appeal for the first time, is pure afterthought." (WILLIS ALLEN'S BRIEF p. 4; see also pp. 14-15.)

This is a misstatement.

Appellants' brief in the court below, which was their first opportunity to answer appellee's affidavit pleading the bar of bankruptcy, made the stated contention and supported it exhaustively. Although referred to in the Transcript of Record [Tr. 143], this brief is not in the Transcript for the reason that appellants now learn for the first time that appellee asserts that the contention was not made below and that appellants may therefore not argue it here.

To cure any possible technical difficulty thus created and in order that the Circuit Court of Appeals may have a true statement of the contentions made below in avoidance of the asserted bar of bankruptcy, appellants by separate motion are asking for this Court's order to incorporate appellants' Brief below, in the Transcript of Record.

(b) In this connection, the following facts appearing of record should be noted:

Appellants' Notice of Motion for Enforcement of Judgment, etc. was served on Willis Allen on April 13, 1950, and filed on May 5, 1950 [Tr. 111], being noticed for hearing on May 22, 1950 [Tr. 110]. Hearing was subsequently continued to July 3, 1950 [Tr. 142], but notwithstanding the ample time thus afforded appellee for his plea, the first time that he set up the plea of discharge in bankruptcy was by his Affidavit mentioned earlier above, served and filed at the time and place of the hearing itself [Tr. 141].

Accordingly, as noted earlier, the first opportunity appellants had for stating and arguing the exceptions of Section 17a of the Bankruptcy Act, in avoidance of appellee's plea, was, in accordance with the Court's instruction, in appellants' BRIEF below. While the fact of appellee's bankruptcy had been reported to appellants and was therefore incidentally mentioned, together with the exception for fraudulent inducement, in appellants' Notice of Motion for Enforcement of the Judgment, etc., this neither purported to be, nor was it a final statement of appellants' position on the subject.

The burden of pleading and proving discharge in bankruptcy is of course upon the party asserting it in bar (6 (Rev. Ed.) Am. Jur. 985), and the creditor is not in a position to answer the plea until it has been made (*ibid.*, at p. 1027). Due to appellee's delay in service and the instruction of the court below based thereon, appellants' answer in avoidance of the plea was made by their Brief below.

(c) Subject to the ruling of the Circuit Court of Appeals on appellants' concurrent motion to incorporate said BRIEF in the Transcript of Record, appellants quote the following from the commencement to page 2 of said BRIEF:

"At the hearing of July 3, 1950 on the present motion, the Court stated that it was satisfied that plaintiffs have met the burden of proving reasonable diligence in enforcing their judgment.

"The Court asked, however, that the parties present briefs with regard to the additional defense applicable only to the defendant WILLIS ALLEN, to the effect that the judgment is unenforceable against him because of his discharge in voluntary bankruptcy in 1943.

"Inasmuch as the Affidavit of WILLIS ALLEN raising this issue was served on plaintiffs at the hearing, without opportunity for prior consideration by plaintiffs, they regard themselves as entitled by means of this Brief to present all reasons why discharge in bankruptcy does not bar enforcement of the judgment against WILLIS ALLEN, without regard to whether or not plaintiffs urged such argument at the hearing.

"Plaintiffs submit that the judgment debt of WILLIS ALLEN on which this motion is founded was not affected by discharge in bankruptcy because it falls squarely within the second clause of section 17 of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 550, 11 U. S. C. A. 35, as amended), which provides:

"*'Debts not Affected By a Discharge.* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (second)



are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another . . . ’”

Thereafter said BRIEF fully asserted and discussed each of the contentions now made on appeal, including the exception in Section 17a for “wilful and malicious injuries to the person or property of another” as applied to this case.

At page 13 of said BRIEF, it is stated:

“IT IS SUBMITTED, THEREFORE, THAT INSOFAR AS THE JUDGMENT FOR PLAINTIFFS HEREIN IS BASED UPON DAMAGES IN THE SUM OF \$10,000 and \$15,150 for defendants’ intentional interference with plaintiffs’ commercial operations by wrongful attachment and defamation of PLAINTIFFS’ TITLE TO THE RADIO STATION FLOWING FROM DEFENDANTS’ CONSPIRACY TO THAT END, IT COMES SQUARELY WITHIN THE MEANING OF THE LANGUAGE OF THE SECOND HALF OF THE SECOND CLAUSE OF SECTION 17 OF THE BANKRUPTCY ACT, DENYING DISCHARGE AS TO ‘WILFUL AND MALICIOUS INJURIES TO THE PERSON OR PROPERTY OF ANOTHER.’”

And the same point is reiterated in the CONCLUSIONS at pages 14 to 15 of said Brief.

It is therefore submitted that, contrary to the statement of appellee WILLIS ALLEN, this contention was made and fully set out below; perforce was overruled by the court below in finding that WILLIS ALLEN was discharged from the judgment herein by his bankruptcy; and is properly reviewable on appeal.



(3) Do the Damages Included in the Judgment in the Sums of \$10,000 and \$15,150 Represent Compensation to Appellants for "Wilful and Malicious Injuries to the Person or Property of Another" Within the Meaning of Section 17a of the Bankruptcy Act?

(a) Appellee claims [Tr. 19-20] that the

"\$10,000 was awarded to compensate plaintiffs for their expenditure of that sum of money in reinstating the concession after it had been cancelled by the Mexican government for failure to complete the construction within the time allowed therefor, the delay having been occasioned by the wrongful attachment. Therefore, it is clear that the \$10,000 portion of the judgment referred to by appellants as having been an award of damages for wilful and malicious injuries to person or property, is not that after all, but instead is only an award of special damages arising because of the wrongful attachment."

The trial court found [see citations to the Transcript of Record at page 7 of Appellants' Opening Brief] that defendants including the appellee WILLIS ALLEN entered into a conspiracy to inflict, and succeeded in inflicting damage in the sum of \$10,000 on appellants by wrongfully causing plaintiff's equipment to be attached so as to interfere with completion of the radio station within the time required by the radio concession and Mexican law applicable thereto, with the result that appellants had to invest an additional \$10,000 to procure reinstatement of the concession.

This was wilful and malicious injury to appellants' property.

Appellee's argument appears to be, however, that unless the wilful and malicious injuries, in this instance by wrongful attachment, are to the very property which is wrongfully attached, Section 17a is inapplicable even though the intended result of that wrongful attachment, as found by the Court in this instance, was to injure the plaintiffs by causing them to lose other property.

The short answer is that Section 17a provides no such qualification on the meaning of the words "wilful and malicious injuries to property." The decisions with regard to the related language of the same section on fraud, show that such qualifications will not be read into the Act (see App. Op. Br. p. 14).

Moreover, the law with regard to causation in tort is not so qualified or restricted:

"That which is the actual cause of the loss, whether operating directly, or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed.'

. . . . .

"Damages which accrue subsequent to the tort, but of which it is the primary cause, are not separate causes of action but 'are parts of the tort itself for which the cause of action is given.' " (*Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114 (1891).)

(b) Appellee claims (his BRIEF at p. 18) that:

"A close inspection of the Transcript shows clearly that the \$15,150 portion of the judgment which appellants are now belatedly claiming was an award for slander of title, is not that at all, but actually is in-

stead a carefully and meticulously calculated award of damages for loss of radio broadcast advertising time.”

Appellee cites in support of the foregoing, from page 74 of the Transcript, but in doing so, neglects the language almost immediately preceding, in the trial court’s Memorandum of Conclusions at pages 73-74, to wit:

“It further appearing that from time to time from and after October 5, 1936, and until the issuance of an injunction *pendente lite* herein restrained such acts, said defendants have notified various persons, including officials of the Mexican government, that they were the owners of said concession and of said radio station, also notified such persons that said plaintiffs were not the owners thereof but merely held possession of the same in fraud of the rights of said defendants, that likewise during said period and until thus restrained said defendants from time to time threatened to sue anyone doing business with said plaintiffs with respect to said radio station, also to attach any amounts which might become owing to said Radio Difusora Internacional from California advertisers using radio time on said station, *and that by reason of said statements, threats and acts of said defendants said Radio Difusora Internacional has been and still is unable to commence normal commercial operations of said station; . . .*” [See also Findings of the trial court, par. XV at Tr. 83.]

It is after thus concluding that the defendants intentionally prevented appellants from commencing operations, that the trial court then computes the resulting damage to appellants in terms of the advertising time they thus lost.

In summary, the trial court found that the damages of \$15,150 flowed from the failure of commencement of appellants' operations:

“ . . . that said last-named plaintiffs have been deprived of such free broadcasts by the acts and conduct of said defendants, and that the value of such free broadcasts has been at the rate of \$300 per month from and after January 17, 1937 . . . .”  
[Tr. 75.]

It also found, first, that this failure of commencement of operations was due to the aforesaid “statements, threats and acts of said defendants” [Tr. 74], and second, that it would not have occurred “if said defendants had performed the terms and conditions of said contract of March 30, 1936, on their part to be performed . . . .”  
[Tr. 74.]

Appellee should not be permitted to take advantage of his own wrong by arguing that he is not liable for tort damage within the exception of Section 17a, because that damage would not have occurred if he had complied with his contract.

Moreover, Section 17a does not qualify or restrict so as to exclude damage flowing from a tort, within the language of that section, because the measure of such damage may happen to coincide with the measure of a damage for which the same party may be liable on theory of breach of contract.

### Conclusion.

The record shows without equivocation, tortious conduct of the defendants including appellee WILLIS ALLEN, in the nature of "obtaining property by false pretenses or false representations," and "wilful and malicious injuries to the person or property of another," within the meaning of Section 17a of the Bankruptcy Act.

It likewise shows that the judgment in favor of appellants in the sum of \$86,210 together with their costs was based upon that tortious conduct.

Appellants do not deem it necessary or proper to reply herein to the gratuitous slur on them, not based on the record or related to the issues, contained in the middle paragraph on page 20 of WILLIS ALLEN'S BRIEF.

Appellants therefore respectfully renew their request for relief on appeal as contained at page 21 of their Opening Brief.

Respectfully submitted,

LEONARD HORWIN,

*Attorney for Appellants.*

No. 12761

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United States  
Court of Appeals  
for the Ninth Circuit.

*see vol. — 12669*  
JACK BORCICH, ANDREW VILICICH and  
BORTUL ZANKICH, Co-Owners of the Oil  
Screw Marsha Ann,

Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON  
BOGDANOVICH, PETER SVORINICH,  
MARTIN MISKULIAN, RAY ZUKOWSKI,  
WILLIAM T. DECKER, GEORGE KOR-  
GAN, SAM BILAS, W. H. HOOPES, NICK  
MILOSEVICH, GEORGE KORGAN and  
SAM BILAS,

Appellees.

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Apostles on Appeal  
In Two Volumes

Volume I  
(Pages 1 to 318)

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Appeal from the United States District Court,  
Southern District of California,  
Central Division.

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CLERK





No. 12761

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United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF PROCTORS

For Appellants:

TRIPP & CALLAWAY,  
210 West Seventh St.,  
Los Angeles 14, Calif.

For Appellees Joseph Ancich et al.:

DAVID A. FALL,  
388 West 7th St.,  
San Pedro, Calif.

For Appellees George Korgan, et al.:

LILLICK, GEARY & McHOSE,  
WILLIAM A. C. ROETHKE,  
634 S. Spring St.,  
Los Angeles 14, Calif.

For Appellees W. H. Hoopes, et al.:

EKDALE & SHALLENBERGER,  
614 S. Pacific Ave.,  
San Pedro, Calif.



In the United States District Court, Southern  
District of California, Central Division  
In Admiralty—No. 8,960-W

JOSEPH ANCICH, JOHN KAIZA, ANTON  
BOGDANOVICH, PETER SVORINICH,  
MARTIN MISKULIAN, RAY ZUKOWSKI  
and WILLIAM T. DECKER,

Libelants,

vs.

D/S “MARSHA ANN,” Her Engines, Tackle,  
Apparel, Furniture, etc., and JACK BOR-  
CICH, FIRST DOE and SECOND DOE, Her  
Owners,

Respondents.

LIBEL IN REM AND IN PERSONAM FOR  
DAMAGES, WAGES AND MAINTENANCE

To the Honorable Judges of the United States Dis-  
trict Court, Southern District of California,  
Central Division:

The libel of Joseph Ancich, late a seaman fisher-  
man aboard the D/S “Bear,” in a cause of damage,  
wages and maintenance, civil and maritime, against  
the D/S “Marsha Ann,” her engines, tackle, ap-  
parel, furniture, etc., and Jack Borcich, First Doe  
and Second Doe, her owners, respectfully shows:

First: That libelant is a seaman, within the  
designation of persons permitted to sue herein with-  
out furnishing bond for or prepayment of, or mak-



ing deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 837, U.S.C.A.

Second: That the D/S "Marsha Ann" is an American fishing vessel and is now or will be during pendency of process herein within the territorial jurisdiction of the above-entitled Court and within the admiralty and maritime jurisdiction of the United States.

Third: That libelant herein was a member of the crew of the D/S "Bear" and employed thereon on a lay or share basis for the sardine fishing season in 1948, which terminates on or about the 1st day of March, 1949.

Fourth: That at about eleven-thirty a.m. on the 30th day of November, 1948, the D/S "Bear" was bound for the port of Los Angeles approximately two miles southeast of the southerly end of the San Pedro breakwater, proceeding on a course of approximately 295 degrees at approximately one knot per hour in a dense fog, sounding fog signals in precise compliance with International Rules, Article 15 A. That at said time and place, the D/S "Marsha Ann" was proceeding upon a course of approximately 205 degrees at a speed in excess of moderate, and not having careful regard to the existing circumstances and conditions. That while the said D/S "Marsha Ann" was proceeding at such speed as aforesaid, she collided in the starboard midship of the D/S "Bear," damaging the

D/S “Bear” to such an extent that repair of said vessel cannot reasonably be completed in a period less than approximately two months.

Fifth: That said collision was caused through the negligence and fault of the D/S “Marsha Ann” and those in charge of her in the following respects, among others, which will more particularly be pointed out at the trial of this action: 1. Those in charge of the D/S “Marsha Ann” were not proceeding at a moderate speed, having careful regard to the existing circumstances and conditions. 2. That those in charge of the D/S “Marsha Ann” did not stop her engines and then navigate with caution until the danger of collision was over when they became aware of the presence of the D/S “Bear” as revealed by the radar aboard the D/S “Marsha Ann.” 3. Those in charge of the D/S “Marsha Ann” were improperly navigating at dangerous and reckless speed under conditions requiring cautious navigation.

Sixth: That libelant is entitled to recover from respondent his damages in the loss of wages in not being able to continue his employment aboard the D/S “Bear” for approximately two months. That by reason of these premises, libelant is damaged in the sum of \$1,500.00, or as will more fully be shown at the time of trial herein.

Seventh: That libelant is entitled to recover from respondents his maintenance during the period

of time he is unable to continue his employment aboard the D/S "Bear" by reason of the aforesaid collision. That the reasonable value of libelant's maintenance is the sum of \$5.00 per day, and that by reason of the aforesaid premises, libelant is entitled to recover the sum of \$300.00 for his maintenance.

Eighth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

For a Second Cause of Action against respondents, libelant John Kaiza alleges:

Ninth: Libelant John Kaiza incorporates herein and makes a part hereof Articles First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth of the first cause of action herein as if the same were fully set forth hereunder.

For a Third Cause of Action against respondents, libelant Anton Bogdanovich alleges:

Tenth: Libelant Anton Bogdanovich incorporates herein and makes a part hereof Articles First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth of the first cause of action herein as if the same were fully set forth hereunder.

For a Fourth Cause of Action against respondents libelant Peter Svorinich alleges:

Eleventh: Libelant Peter Svorinich incorporates herein and makes a part hereof Articles First, Sec-

ond, Third, Fourth, Fifth, Sixth, Seventh and Eighth of the first cause of action herein as if the same were fully set forth hereunder.

For a Fifth Cause of Action against respondents libelant Martin Miskulian alleges:

Twelfth: Libelant Martin Miskulian incorporates herein and makes a part hereof Articles First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth of the first cause of action herein as if the same were fully set forth hereunder.

For a Sixth Cause of Action against respondents libelant Ray Zukowski alleges:

Thirteenth: Libelant Ray Zukowski incorporates herein and makes a part hereof Articles First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth of the first cause of action herein as if the same were fully set forth hereunder.

For a Seventh Cause of Action against respondents libelant William T. Decker alleges:

Fourteenth: Libelant William T. Decker incorporates herein and makes a part hereof Articles First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth of the first cause of action herein as if the same were fully set forth hereunder.

Wherefore, libelants Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski and William T. Decker, pray that process in due form of law may issue against the D/S "Marsha Ann," her engines, tackle, ap-

parel, furniture, etc., and all persons having or claiming any interest therein may be cited to appear and answer in the premises; that citation in due form of law may issue against the respondents, Jack Borcich, First Doe and Second Doe, citing them to appear and answer in the premises, and that this Court will decree the payment by said respondents to the libelants as follows: to Joseph Ancich, the sum of \$1,800.00; to John Kaiza, the sum of \$1,800.00; to Anton Bogdanovich, the sum of \$1,800.00; to Peter Svorinich, the sum of \$1,800.00; to Martin Miskulian, the sum of \$1,800.00; to Ray Zukowski, the sum of \$1,800.00; and to William T. Decker, the sum of \$1,800.00.

That said D/S “Marsha Ann” may be condemned and sold to pay the same, together with interest and costs, and that said libelants may have such other and further relief as may be just and proper.

/s/ DAVID A. FALL,  
Proctor for Libelants.

State of California,  
County of Los Angeles—ss.

Joseph Ancich, being by me first duly sworn, deposes and says: that he is the Libelant in the above-entitled action; that he has read the foregoing Libel and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters that he believes it to be true.



Joseph Ancich makes the verification for all libelants herein for the reason that all facts stated in the libel are within his knowledge.

/s/ JOSEPH ANCICH.

Subscribed and sworn to before me this 8th day of December, 1948.

[Seal] /s/ DAVID A. FALL,  
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 9, 1948.

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[Title of District Court and Cause.]

CLAIM OF JACK BORCICH, et al.

Now, Before This Honorable Court, Appear Jack Borcich, Andrew Vilicich and Bortul Zankich, co-owners of the D/S "Marsha Ann," her engines, tackle, apparel, furniture, etc., by said Jack Borcich, and make claim to the said vessel, etc., and aver that they are the true and bona fide owners of said vessel, etc., and that no other person is the owner thereof.

Wherefore, they pray to defend this suit accordingly.

JACK BORCICH,  
ANDREW VILICICH and  
BORTUL ZANKICH,

By /s/ JACK BORCICH.



State of California,  
County of Los Angeles—ss.

Jack Borcich, being first duly sworn, deposes and says:

That Jack Borcich, Andrew Vilicich and Bortul Zankich are the true and bona fide owners of the fishing vessel "Marsha Ann," her engines, tackle, apparel, furniture, etc., against which suit has been commenced by Joseph Ancich, et al., libelants; that at the time of the commencement of said suit the said fishing vessel "Marsha Ann," her engines, tackle, apparel, furniture, etc., was in the lawful possession of said owners; that deponent is one of said owners and is duly authorized by the others of said owners to make this claim.

/s/ JACK BORCICH.

Subscribed and sworn to before me this 11th day of December, 1948.

[Seal]      /s/ ELIZABETH P. WILLIAMS,  
Notary Public in and for  
Said County and State.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Dec. 15, 1948.

In the District Court of the United States, Southern District of California, Central Division  
In Admiralty—Case No. 8,960-W

JOSEPH ANCICH, et al.,

Libelants,

vs.

D/S MARSHA ANN, Her Engines, Tackle, Apparel, Furniture, etc., and JACK BORCICH, FIRST DOE and SECOND DOE, Her Owners,

Respondents.

GEORGE KORGAN and SAM BILAS,

Intervening Libelants,

vs.

Oil Screw MARSHA ANN, Her Engines, Tackle, Apparel, Furniture, etc., and JACK BORCICH, ANDREW VILICICH, BORTUL ZANKICH, DOE I, DOE II and DOE III,

Respondents.

INTERVENING LIBEL IN REM AND IN PERSONAM FOR COLLISION DAMAGES

To the Honorable, the Judges of the District Court of the United States, for the Southern District of California, Sitting in Admiralty:

The intervening libel of George Korgan and Sam Bilas, against the Oil Screw Marsha Ann, her engines, tackle, apparel, furniture, etc., and against

all persons intervening for their interests therein, and against Jack Borcich, Andrew Vilicich, Bortul Zankich, Doe I, Doe II and Doe III, in a cause of collision, civil and maritime, alleges:

### I.

That at all times hereinafter mentioned these intervening libelants were, and now are, the sole and only owners of the Oil Screw Bear, a fishing vessel.

### II.

Intervening libelants herein are informed and believe, and upon such information and belief allege, that the Oil Screw Marsha Ann is now, or during the pendency of process herein will be, within this district and within the jurisdiction of this Honorable Court.

### III.

Intervenng libelants herein are informed and believe and upon such information and belief allege that respondents Jack Borcich, Andrew Vilicich, Bortul Zankich, Doe I, Doe II and Doe III at all times hereinafter mentioned were, and now are, the owners and operators of said Oil Screw Marsha Ann, a fishing vessel. The true names of respondents Doe I, Doe II and Doe III, are unknown to intervening libelants herein, and when their true names are ascertained, intervening libelants will ask leave of court to amend this intervening libel to set forth the true names of said respondents in lieu of said fictitious names.

## IV.

Intervening libelants herein are informed and believe, and upon such information and belief allege, that on or about November 30, 1948, at about 11:30 o'clock (Pacific Daylight Time), in the morning of said day, a collision occurred between the Oil Screw Bear and the Oil Screw Marsha Ann about 2½ miles southeast of the Los Angeles Harbor Breakwater Light, as a result of which collision said Oil Screw Bear was damaged, as more particularly hereinafter alleged.

## V.

Intervening libelants herein are informed and believe, and upon such information and belief, allege that the circumstances of said collision were as follows: the Bear was proceeding at a speed of about 1½ miles per hour in a general northwesterly direction toward and about 2½ miles southeast of the Los Angeles Harbor Breakwater Light. A heavy fog was laying off the coast in this vicinity, enveloping the movements of vessels in the area. At the time of the collision and for more than an hour preceding the same, the Bear was sounding fog signals in compliance with the applicable Rules of the Road. Whistles of other vesesls were heard in the vicinity of the Bear, as a result of which the Bear alternately stopped and then proceeded with caution at a speed of approximately 1½ miles per hour. While so navigating, the Marsha Ann suddenly appeared, proceeding at an excessive speed, broad on the starboard beam of the Bear at a distance of about 40 feet. Before any steps could be

taken to avert or minimize the collision, the Marsha Ann struck the Bear at almost a right angle on the starboard side of the Bear just abaft the deck house, at which time the Bear was virtually dead in the water. At all times herein mentioned the Bear was in all respects seaworthy and properly equipped and supplied and manned by competent master and crew, and was well and carefully navigated in accordance with the applicable Rules of the Road then and there pertinent.

## VI.

Intervening libelants herein are informed and believe, and upon such information and belief allege, that said Oil Screw Bear committed no fault and was guilty of no negligence in the premises, and said collision and damage to said Oil Screw Bear were solely due to the carelessness, negligence and recklessness of said Oil Screw Marsha Ann and respondents, and their agents and servants, in the following respects:

1. The Marsha Ann did not have on watch proper and competent persons attentive to their duties;

2. The Marsha Ann did not have on watch proper and competent lookouts, properly stationed and attentive to their duties;

3. The Marsha Ann did not have a proper and competent helmsman properly stationed and attentive to his duties;



4. The Marsha Ann failed to sound proper whistle signals;

5. The Marsha Ann was navigated at an excessive speed in an erratic and reckless manner in fog and in neglect of the care required in the circumstances by the ordinary precautions of good seamanship, although she was required to exercise such precautions by the rules of navigation applicable in the circumstances;

6. The Marsha Ann failed to give due regard to the dangers of navigation and collision, and particularly the danger of collision with the Bear, although she was required to do so by the rules of navigation applicable in the circumstances;

7. The Marsha Ann, prior to the collision, having observed on her radar screen the presence of the Bear in a position forward of the bow of the Marsha Ann, when the danger of collision was apparent, failed and neglected to stop or reverse her engines and then navigate with caution, until the danger of collision was over;

8. The Marsha Ann was negligent in other and further particulars than those hereinabove set forth, of which intervening libelants are not presently advised, but as to which these intervening libelants beg leave to offer proof when and as advised and amend this intervening libel accordingly.

## VII.

By reason of said collision and said damage to said Oil Screw Bear, these intervening libelants



have sustained damages in the amount of \$20,000 for the reasonable costs of repair to said vessel.

### VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, your intervenors pray:

1. That they and each of them may be permitted to intervene according to the course and practice of admiralty and maritime jurisdiction in the proceedings in rem and in personam herein.

2. That process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said Oil Screw Marsha Ann, her engines, tackle, apparel, furniture, etc., and that all persons having any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid.

3. That citation in personam may issue against said respondents and each of them and that they be required to appear and answer under oath all and singular the matters aforesaid.

4. That this Honorable Court be pleased to decree the payment by respondents, and each of them, of the damages aforesaid together with interest thereon and costs of suit herein; and that said Oil Screw Marsha Ann may be condemned and sold to pay the amounts due to these intervening libelants; and that said claims be paid from the proceeds of

the sale of said vessel, if sufficient in amount, and for judgment in personam against said individual respondents.

5. That these intervening libelants have such other and further relief in the premises as they may be entitled to receive.

LILLICK, GEARY & McHOSE,  
WILLIAM A. C. ROETHKE,

By /s/ WILLIAM A. C. ROETHKE,  
Proctors for Intervening Libelants, George Korgan  
and Sam Bilas.

Good cause appearing therefor, It Is Hereby Ordered that the foregoing Intervening Libel in Rem and in Personam for collision damage be allowed and filed herein and that intervenors George Korgan and Sam Bilas be entitled to participate fully in all further proceedings herein.

Dated: Los Angeles, California, this 27th day of December, 1948.

/s/ PAUL J. McCORMICK,  
United States District Judge.

State of California,  
County of Los Angeles—ss.

George Korgan, being by me first duly sworn, deposes and says:

That he is one of the intervening libelants in the above-entitled action; that he has read the foregoing intervening libel and knows the contents thereof and that the same is true of his own knowledge except

as to the matters which are therein set forth upon his information and belief and as to those matters that he believes them to be true.

/s/ GEO. KORGAN.

Subscribed and sworn to before me this 24th day of December, 1948.

[Seal]      /s/ BERTHA E. BRASACK,  
Notary Public in and for  
Said County and State.

My Commission Expires August 18, 1950.

[Endorsed]: Filed Dec. 27, 1948.

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[Title of District Court and Cause.]

### CLAIM OF JACK BORCICH, ET AL.

Now, Before This Honorable Court, Appear Jack Borcich, Andrew Vilicich and Bortul Zankich, co-owners of the Oil Screw "Marsha Ann," her engines, tackle, apparel, furniture, etc., by said Jack Borcich, and make claim to the said vessel, etc., and aver that they are the true and bona fide owners of said vessel, etc., and that no other person is the owner thereof.

Wherefore, they pray to defend said suit accordingly.

JACK BORCICH,  
ANDREW VILICICH, and  
BORTUL ZANKICH,

By /s/ JACK BORCICH.

State of California,  
County of Los Angeles—ss.

Jack Borcich, being first duly sworn, deposes and says:

That Jack Borcich, Andrew Vilicich and Bortul Zankich are the true and bona fide owners of the fishing vessel "Marsha Ann," her engines, tackle, apparel, furniture, etc., against which suit has been commenced by George Korgan and Sam Bilas, intervening libelants; that at the time of the commencement of said suit the said fishing vessel "Marsha Ann," her engines, tackle, apparel, furniture, etc., was in the lawful possession of said owners; that deponent is one of said owners and is duly authorized by the others of said owners to make this claim.

/s/ JACK BORCICH.

Subscribed and sworn to before me this 28th day of December, 1948.

[Seal]      /s/ ELIZABETH P. WILLIAMS,  
Notary Public in and for  
Said County and State.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 28, 1948.

[Title of District Court and Cause.]

## ANSWER TO LIBEL

To the Honorable, the Judges of the Above-Entitled Court:

The answer of Jack Borcich, Andrew Vilicich and Bortul Zankich, co-owners of the fishing vessel Marsha Ann, her engines, tackle, apparel and furniture, to the libel herein of Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski and William T. Decker, admit, deny and allege:

### I.

Respondents allege that they have no knowledge, information or belief sufficient to answer the allegations of Article First of the said libel, and on that ground deny each any every, all and singular, generally and specifically the allegations of the said Article First.

### II.

Respondents admit the allegations of Article Second of the libel.

### III.

Respondents allege that they have no knowledge, information or belief sufficient to answer the allegations of Article Third of said libel, and on that ground deny that libelant was a member of the crew of the D/S "Bear" and/or was employed thereon, whether on the terms and/or for the time alleged or otherwise, or at all.



## IV.

Answering the allegations of Article Fourth of the said libel respondents deny each and every, all and singular, generally and specifically the allegations of said Article Fourth, except as hereinbelow expressly alleged or admitted; further answering said Article Fourth these respondents deny that the D/S "Marsha Ann" collided with the D/S "Bear," or that the D/S "Bear" was damaged as alleged in said Article, or otherwise, or at all, whether to the extent alleged in said Article Fourth or to any extent, or at all.

Respondents allege that the circumstances and happenings on the date specified in the said Article Fourth were as follows:

On or about the 30th day of November, 1948, between 11:00 and 11:30 a.m. the D/S "Marsha Ann" was proceeding outward through the breakwater of San Pedro Bay in a heavy fog; visibility was limited to 10-15 feet; the speed of the "Marsha Ann" was not more than two knots; fog signals, as prescribed by the International Rules of the Road at Sea, were being given by the "Marsha Ann"; when the said "Marsha Ann" was about 200 yards outside of the said breakwater and southeast of the Los Angeles Harbor Light, its radar operator notified Captain Jack Borcich that the radar screen indicated that three vessels, one to the starboard and two to the port, were heading for the entrance to the breakwater; Captain Borcich immediately disengaged the engine to let these boats enter the breakwater safely.



The "Marsha Ann" had been stopped for four or five minutes, having no way upon her, when the lookout in the bow of the "Marsha Ann" called attention to a vessel (the D/S "Bear") approximately twenty feet off the port bow of the "Marsha Ann"; Captain Borcich immediately sounded the danger signals, as prescribed by the International Rules of the Road at Sea; the "Bear" was moving at a speed greatly in excess of moderate, on a course which would have scarcely cleared the bow of the "Marsha Ann," when suddenly the "Bear" made a turn hard to port, swinging its stern toward the "Marsha Ann" in such a manner as to cause the starboard beam of the "Bear" to strike the stem of the "Marsha Ann."

Respondents further allege that at all times herein mentioned the "Marsha Ann" was in all respects seaworthy, properly equipped, supplied and manned by a competent master and crew and was well, carefully and prudently navigated in accordance with the applicable International Rules of the Road at Sea.

## V.

Answering the allegations of Article Fifth respondents deny each, every, all and singular, generally and specifically, the allegations therein contained; further answering said Article Fifth these respondents deny that the alleged accident, or damage, or either or any thereof, was caused or occasioned, or in any manner contributed to by the said, or any, negligence, fault or liability on the part of these respondents, their agents or employees,

or either or any of them, whether in the respects alleged in the said Article or otherwise, or at all.

In this connection, respondents allege that the "Marsha Ann" was guilty of no negligence and/or fault in the premises. Respondents are informed and believe and therefore allege that said collision and alleged damage to the D/S "Bear," if any, were due solely to the recklessness, carelessness, negligence and fault of the said "Bear," its Captain and crew in the following respects:

1. The "Bear" did not have on watch proper and competent persons attentive to their duties;
2. The "Bear" did not have on watch proper and competent lookouts, properly stationed and attentive to their duties;
3. The "Bear" did not have a proper and competent helmsman properly stationed and attentive to his duties;
4. The "Bear" failed to sound proper whistle signals;
5. The "Bear" was navigated at an excessive speed in an erratic and reckless manner in fog and in neglect of the care required in the circumstances by the ordinary precautions of good seamanship, although she was required to exercise such precautions by the rules of navigation applicable in the circumstances;
6. The "Bear" failed to give due regard to the dangers of navigation and collision, and particu-

larly the danger of collision with the "Marsha Ann," although she was required to do so by the rules of navigation applicable in the circumstances;

7. The "Bear" was negligent in other and further particulars than those hereinabove set forth, of which respondents are not presently advised, but as to which these respondents beg leave to offer proof when and as advised and amend this answer accordingly.

## VI.

Answering the allegations of Article Sixth of the libel, respondents deny each and every, all and singular, generally and specifically the allegations of said Article Sixth and deny that any damage was sustained by libelant, either as alleged in said Article, or otherwise, or at all; and deny that libelant was damaged in the sum alleged in the said Article Sixth, or in any other sum, or at all, whether for the reasons alleged in said Article Sixth or for any other reason, or at all.

## VII.

Answering the allegations of Article Seventh of the libel, respondents deny each and every, all and singular, generally and specifically the allegations of said Article Seventh and deny that any damage was sustained by libelant, either as alleged in said Article Seventh, or otherwise, or at all; deny that libelant is entitled to recover the sums alleged in said Article Seventh, or any other sums, or at all; whether for the reasons alleged in said Article, or any other reason, or at all.

VIII.

Answering the allegations of Article Eighth respondents deny that all or singular the premises of the libel are true, except as herein specifically admitted, but admit that if true they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

IX.

Answering the Second Cause of Action and Article Ninth respondents incorporate herein and make a part hereof the answers hereinabove set forth to the Articles incorporated in the said Article Ninth.

X.

Answering the Third Cause of Action and Article Tenth respondents incorporate herein and make a part hereof the answers hereinabove set forth to the Articles incorporated in the said Article Tenth.

XI.

Answering the Fourth Cause of Action and Article Eleventh respondents incorporate herein and make a part hereof the answers hereinabove set forth to the Articles incorporated in the said Article Eleventh.

XII.

Answering the Fifth Cause of Action and Article Twelfth respondents incorporate herein and make a part hereof the answers hereinabove set forth to the Articles incorporated in the said Article Twelfth.

## XIII.

Answering the Sixth Cause of Action and Article Thirteenth respondents incorporate herein and make a part hereof the answers hereinabove set forth to the Articles incorporated in the said Article Thirteenth.

## XIV.

Answering the Seventh Cause of Action and Article Fourteenth respondents incorporate herein and make a part hereof the answers hereinabove set forth to the Articles incorporated in the said Article Fourteenth.

Wherefore, respondents pray that libelants take nothing by their libel, that said libel be dismissed, and that respondents have and recover their costs of suit incurred herein, and for such other and further relief as may be just.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY.

State of California,

County of Los Angeles—ss.

Hulen C. Callaway, being by me first duly sworn, deposes and says: that he is an attorney at law admitted to practice before all Courts of the State of California and has his office in Los Angeles County, California, and is one of attorneys for respondents in the foregoing and above entitled action; that he has read the foregoing Answer to Libel and knows the contents thereof; and that the same is true of his own knowledge, except as to the mat-



ters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That he makes this verification on behalf of respondents herein because respondents are absent from said county where affiant has his office.

/s/ HULEN C. CALLAWAY.

Subscribed and sworn to before me this 10th day of January, 1949.

[Seal] /s/ ELIZABETH P. WILLIAMS,  
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jan. 10, 1949.

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[Title of District Court and Cause.]

### ANSWER TO INTERVENING LIBEL

To the Honorable, the Judges of the Above-Entitled Court:

The answer of Jack Borcich, Andrew Vilicich and Bortul Zankich, co-owners of the Oil Screw Marsha Ann, her engines, tackle, apparel and furniture, to the intervening libel herein of George Korgan and Sam Bilas, admit, deny and allege:

#### I.

Respondents allege that they have no knowledge, information or belief sufficient to answer the allega-



tions of Article I of the said intervening libel, and on that ground deny each and every, all and singular, generally and specifically the allegations of the said Article I, or that intervening libelants own any interest whatsoever in the Oil Screw Bear.

## II.

Respondents admit the allegations of Article II of the intervening libel.

## III.

Answering Article III respondents admit that Jack Borcich, Andrew Vilicich and Bortul Zankich at all times were, and now are, the sole owners and operators of the Oil Screw Marsha Ann. Except as herein expressly admitted respondents deny each and every, all and singular, generally and specifically the allegations of the said Article III.

## IV.

Answering the allegations of Article IV respondents admit that a collision occurred between the Oil Screw Bear and the Oil Screw Marsha Ann at approximately the time alleged in the said Article IV. Except as herein expressly admitted respondents deny each and every, all and singular, generally and specifically the allegations of said Article IV.

## V.

Answering the allegations of Article V of the said intervening libel respondents deny each and every, all and singular, generally and specifically the allegations of said Article V, except as hereinbelow expressly alleged or admitted.

Respondents alleged that the circumstances and happenings on the date specified in the said Article V were as follows:

On or about the 30th day of November, 1948, between 11:00 and 11:30 a.m., the Oil Screw Marsha Ann was proceeding outward through the breakwater of San Pedro Bay in a heavy fog; visibility was limited to 10-15 feet; the speed of the Marsha Ann was not more than two knots; fog signals, as prescribed by the International Rules of the Road at Sea, were being given by the Marsha Ann; when the said Marsha Ann was about 200 yards outside of the said breakwater and southeast of the Los Angeles Harbor Light, its radar operator notified Captain Jack Borch that the radar screen indicated that three vessels, one to the starboard and two to the port, were heading for the entrance to the breakwater; Captain Borch immediately disengaged the engine to let these boats enter the breakwater safely.

The Marsha Ann had been stopped for four or five minutes, having no way upon her, when the lookout in the bow of the Marsha Ann called attention to a vessel (The Oil Screw Bear) approximately twenty feet off the port bow of the Marsha Ann; Captain Borch immediately sounded the danger signals, as prescribed by the International Rules of the Road at Sea; the Bear was moving at a speed greatly in excess of moderate, on a course which would have scarcely cleared the bow of the Marsha Ann, when suddenly the Bear made a turn hard to port, swinging its stern toward the Marsha

Ann in such a manner as to cause the starboard beam of the Bear to strike the stem of the Marsha Ann.

Respondents further allege that at all times herein mentioned the Marsha Ann was in all respects seaworthy, properly equipped, supplied and manned by a competent master and crew and was well, carefully and prudently navigated in accordance with the applicable International Rules of the Road at Sea.

## VI.

Answering the allegations of Article VI respondents deny each and every, all and singular, generally and specifically, the allegations therein contained; further answering said Article VI these respondents deny that the alleged accident, or damage, or either or any thereof, was caused or occasioned, or in any manner contributed to by the said, or any, negligence, fault or liability on the part of these respondents, their agents or employees, or either or any of them, whether in the respects alleged in the said Article or otherwise, or at all.

In this connection, respondents allege that the Marsha Ann was guilty of no negligence and/or fault in the premises. Respondents are informed and believe and therefore allege that said collision and alleged damage to the Oil Screw Bear, if any, were due solely to the recklessness, carelessness, negligence and fault of the said Bear, its Captain and crew in the following respects:

1. The Bear did not have on watch proper and competent persons attentive to their duties;

2. The Bear did not have on watch proper and competent lookouts, properly stationed and attentive to their duties;

3. The Bear did not have a proper and competent helmsman properly stationed and attentive to his duties;

4. The Bear failed to sound proper whistle signals;

5. The Bear was navigated at an excessive speed in an erratic and reckless manner in fog and in neglect of the care required in the circumstances by the ordinary precautions of good seamanship, although she was required to exercise such precautions by the rules of navigation applicable in the circumstances;

6. The Bear failed to give due regard to the dangers of navigation and collision, and particularly the danger of collision with the *Marsha Ann*, although she was required to do so by the rules of navigation applicable in the circumstances;

7. The Bear was not seaworthy nor properly equipped, supplied or manned by a competent master and/or crew.

## VII.

Answering the allegations of Article VII of the intervening libel, respondents allege that they have no information or belief sufficient to answer the allegations of Article VII and on that ground deny each and every, all and singular, generally and specifically the allegations of said Article VII and

deny that any damage was sustained by intervening libelants, either as alleged in said Article, or otherwise, or at all; and deny that intervening libelants were damaged in the sum alleged in the said Article VII, or in any other sum, or at all, whether for the reasons alleged in said Article VII or for any other reason, or at all.

### VIII.

Answering the allegations of Article VIII respondents deny that all or singular the premises of the intervening libel are true, except as herein specifically admitted, but admit that if true they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, respondents pray that intervening libelants take nothing by their intervening libel, that said intervening libel be dismissed, and that respondents have and recover their costs of suit incurred herein, and for such other and further relief as may be just.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

Proctors for Respondents.

State of California,  
County of Los Angeles—ss.

Hulen C. Callaway, being by me first duly sworn, deposes and says: that he is an attorney at law admitted to practice before all Courts of the State of California and has his office in Los Angeles County, California, and is one of the attorneys for



respondents in the foregoing and above entitled action; that he has read the foregoing Answer to Intervening Libel and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ HULEN C. CALLAWAY.

Subscribed and sworn to before me this 11th day of January, 1949.

[Seal]      /s/ ELIZABETH P. WILLIAMS,  
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jan. 12, 1949.

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[Title of District Court and Cause.]

### STIPULATION FOR PERMISSION TO FILE INTERVENING LIBEL

It Is Hereby Stipulated by and between David A. Fall, Proctor for the libelants; Hulen C. Callaway, Proctor for the respondents; Lillick, Geary & McHose, by William A. C. Roethke, Proctors for other intervening libelants, and Ekdale & Shallenberger, by Gordon P. Shallenberger, Proctors for intervenors, W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, that the Intervening Libel of W. H. Hoopes, Nick Milosevich, George Korgan



and Sam Bilas may be filed forthwith, and It Is Further Stipulated that the Answer of the respondents already on file may be deemed to be a complete Answer to the Libel of the intervenors, save and except as to the damage allegations, and as to those they may be deemed to be denied by the respondents the same as though formal pleadings were on file.

It Is Further Stipulated by and between the parties that no continuance will be asked as to the pre-trial hearing set for December 5, 1949, and as to the trial set for December 8, 1949, by reason of the filing of this intervention.

Signed and dated this 2d day of December, 1949.

/s/ DAVID A. FALL,  
Proctor for Libelants.

/s/ HULEN C. CALLAWAY,  
Proctor for Respondents.

LILLICK, GEARY & McHOSE,

By /s/ WILLIAM A. C. ROETHKE,  
Proctors for Other Intervening Libelants.

EKDALE &  
SHALLENBERGER,

By /s/ GORDON P.  
SHALLENBERGER,  
Proctors for Intervening Libelants.

Good cause appearing therefor, It Is Hereby Ordered that the foregoing Stipulation for Permis-

sion to File Intervening Libel be allowed and filed herein and that intervenors, W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, be entitled to participate fully in all further proceedings herein.

Dated: Los Angeles, California, this 2nd day of December, 1949.

/s/ JAMES M. CARTER,  
United States District Judge.

[Endorsed]: Filed Dec. 2, 1949.

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[Title of District Court and Cause.]

INTERVENING LIBEL IN REM AND IN  
PERSONAM FOR COLLISION DAMAGES

To the Honorable, the Judges of the District Court  
of the United States, for the Southern District  
of California, Sitting in Admiralty:

The intervening libel of W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, against the Oil Screw "Marsha Ann," her engines, tackle, apparel, furniture, etc., and against all persons intervening for their interests therein, and against Jack Borcich, Andrew Vilicich, Bortul Zankich, Doe I, Doe II and Doe III, in a cause of collision, civil and maritime, alleges:

I.

That all times hereinafter mentioned, these intervening libelants, George Korgan and Sam Bilas,

were, and now are, the sole and only owners of the Oil Screw "Bear," a fishing vessel.

## II.

Intervening libelants herein are informed and believe, and upon such information and belief allege, that the Oil Screw "Marsha Ann" is now, or during the pendency of process herein will be, within this District and within the jurisdiction of this Honorable Court.

## III.

Intervenng libelants herein are informed and believe, and upon such information and belief allege, that respondents, Jack Borcich, Andrew Vilicich, Botrul Zankich, Doe I, Doe II and Doe III, at all times hereinafter mentioned were, and now are, the owners and operators of said Oil Screw "Marsha Ann," a fishing vessel. The true names of respondents Doe I, Doe II and Doe III, are unknown to intervening libelants herein, and when their true names are ascertained, intervening libelants will ask leave of Court to amend this intervening libel to set forth the true names of said respondents in lieu of said fictitious names.

## IV.

Intervening libelants herein are informed and believe, and upon such information and belief allege, that on or about November 30, 1948, at about 11:30 o'clock (Pacific Daylight Time), in the morning of said day, a collision occurred between the Oil Screw "Bear" and the Oil Screw "Marsha Ann" about

2½ miles southeast of the Los Angeles Harbor Breakwater Light, as a result of which collision said Oil Screw "Bear" was damaged, as more particularly hereinafter alleged.

## V.

Intervening libelants herein are informed and believe, and upon such information and belief allege, that the circumstances of said collision were as follows: The "Bear" was proceeding at a speed of about 1½ miles per hour in a general northwesterly direction toward and about 2½ miles southeast of the Los Angeles Harbor Breakwater Light. A heavy fog was laying off the coast in this vicinity, enveloping the movements of vessels in the area. At the time of the collision and for more than an hour preceding the same, the "Bear" was sounding fog signals in compliance with the applicable Rules of the Road. Whistles of other vessels were heard in the vicinity of the "Bear," as a result of which the "Bear" alternately stopped and then proceeded with caution at a speed of approximately 1½ miles per hour. While so navigating, the "Marsha Ann" suddenly appeared, proceeding at an excessive speed, board on the starboard beam of the "Bear" at a distance of about 40 feet. Before any steps could be taken to avert or minimize the collision, the "Marsha Ann" struck the "Bear" at almost a right angle on the starboard side of the "Bear" just abaft the deck house at which time the "Bear" was virtually dead in the water. At all times herein mentioned the "Bear" was in all respects seaworthy

and properly equipped and supplied and manned by competent master and crew, and was well and carefully navigated in accordance with the applicable Rules of the Road then and then pertinent.

## VI.

Intervening libelants herein are informed and believe, and upon such information and belief allege, that said Oil Screw "Bear" committed no fault and was guilty or no negligence in the premises, and said collision and damage to said Oil Screw "Bear" were solely due to the carelessness, negligence and recklessness of said Oil Screw "Marsha Ann" and respondents, and their agents and servants, in the following respects:

1. The "Marsha Ann" did not have on watch proper and competent persons attentive to their duties;

2. The "Marsha Ann" did not have on watch proper and competent lookouts, properly stationed and attentive to their duties;

3. The "Marsha Ann" did not have a proper and competent helmsman properly stationed and attentive to his duties;

4. The "Marsha Ann" failed to sound proper whistle signals;

5. The "Marsha Ann" was navigated at an excessive speed in an erratic and reckless manner in fog and in neglect of the care required in the circumstances by the ordinary precautions of good



seamanship, although she was required to exercise such precautions by the rules of navigation applicable in the circumstances;

6. The "Marsha Ann" failed to give due regard to the dangers of navigation and collision, and particularly the danger of collision with the "Bear," although she was required to do so by the rules of navigation applicable in the circumstances;

7. The "Marsha Ann," prior to the collision, having observed on her radar screen the presence of the "Bear" in a position forward of the bow of the "Marsha Ann," when the danger of collision was apparent, failed and neglected to stop or reverse her engines and then navigate with caution, until the danger of collision was over;

8. The "Marsha Ann" was negligent in other and further particulars than those hereinabove set forth, of which intervening libelants are not presently advised, but as to which these intervening libelants beg leave to offer proof when and as advised and amend this intervening libel accordingly.

## VII.

That by reason of said collision, the Oil Screw vessel "Bear" was damaged, and repairs made necessary by reason thereof; that by reason of said repairs and the time necessary therefor, the vessel was unable to engage in fishing from November 30, 1949, to February 17, 1950, and has sustained a loss by reason of such detention in the amount of Five Thousand and No/100 Dollars (\$5,000.00).



## VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

For a further, second, separate and distinct cause of action, the intervening libel of W. H. Hoopes and Nick Milosevich against the Oil Screw "Marsha Ann," her engines, tackle, apparel, furniture, etc., and against all persons intervening for their interests therein, and against Jack Borcich, Andrew Vilicich, Bortul Zankich, Doe I, Doe II and Doe III, in a cause of collision, civil and maritime, alleges:

## I.

These intervening libelants repeat and reallege Paragraphs I, II, III, IV, V, VI and VIII of the First Cause of Action and made a part hereof the same as though set forth herein in full.

## II.

That W. H. Hoopes and Nick Bilosevich were employed as crew members aboard the vessel "Bear" for the sardine season, to wit, October 1, 1949, to March 1, 1950; that they entered upon and continued in the service of said vessel until November 30, 1949, the date of the collision hereinbefore alleged; that by reason of the negligence of the vessel "Marsha Ann" and the respondents named herein as hereinbefore alleged, the mentioned vessel "Bear" was unable to operate from the period from November 30, 1949, to February 17, 1950; that your intervening libelants, W. H. Hoopes and Nick

Milosevich, were not able to secure other employment during the period of said time; that they would have earned approximately One Thousand Five Hundred and No/100 Dollars (\$1,500.00) each had said vessel not been laid up for repairs as a result of the mentioned collision; that your intervening libelants are, therefore, damaged in the sum of One Thousand Five Hundred and No/100 Dollars (\$1,500.00) each.

For a further, third, separate and distinct cause of action, the intervening libel of George Korgan and Sam Bilas, against the Oil Screw "Marsha Ann," her engines, tackle, apparel, furniture, etc., and against all persons intervening for their interests therein, and against Jack Boreich, Andrew Vilicich, Bortul Zankich, Doe I, Doe II and Doe III, in a cause of collision, civil and maritime, alleges:

### I.

These intervening libelants repeat and reallege Paragraphs I, II, III, IV, V, VI and VIII of the First Cause of Action and made a part hereof the same as though set forth herein in full.

### II.

That the mentioned intervening libelants, George Korgan and Sam Bilas, at the time of the collision heretofore alleged, were both working as fishermen aboard the vessel "Bear," and entitled to a fishing share, in addition to their shares as owners of the vessel.

## III.

That by reason of the collision heretofore alleged, and the negligence of the vessel "Marsha Ann," her owners, operators and the respondents named herein, the vessel "Bear" was unable to operate from the period of November 30, 1949, to February 17, 1950; that your intervening libelants, George Korgan and Sam Bilas, were not able to secure other employment; that they would have earned, for their share as fishermen, the sum of One Thousand Five Hundred and No/100 Dollars (\$1,500.00), each, had said vessel not been laid up for repairs as a result of the mentioned collision; that your intervening libelants, George Korgan and Sam Bilas, are, therefore, further damaged in the sum of One Thousand Five Hundred and No/100 Dollars (\$1,500.00).

Wherefore, your intervening libelants pray:

1. That they and each of them may be permitted to intervene according to the course and practice of admiralty and maritime jurisdiction in the proceedings in rem and in personam herein.

2. That this Honorable Court be pleased to decree the payment by the respondents, and each of them, of the damages aforesaid, together with interest thereon and costs of suit herein; and that the intervening libelants be permitted to participate in the bond, or undertaking, on file herein.

3. That these intervening libelants have such

other and further relief in the premises as they may be entitled to receive.

EKDALE &  
SHALLENBERGER,

By /s/ GORDON P.

SHALLENBERGER,  
Proctors for Intervening  
Libelants.

Good cause appearing therefor, It Is Hereby Ordered that the foregoing Intervening Libel in Rem and in Personam for collision damage be allowed and filed herein and that intervenors, W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, be entitled to participate fully in all further proceedings herein.

Dated: Los Angeles, California, this 2nd day of December, 1949.

/s/ JAMES M. CARTER,  
United States District Judge.

United States of America,  
Southern District of California,  
Central Division—ss.

George Korgan, being by me first duly sworn, deposes and says: that he is one of the Intervening Libelants in the above-entitled action; that he has read the foregoing Intervening Libel in Rem and in Personam for Collision Damages and knows the contents thereof; and that the same is true of his

own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters that he believes it to be true.

/s/ GEORGE KORGAN.

Subscribed and sworn to before me this 1st day of December, 1949.

[Seal] /s/ GORDON P.

SHALLENBERGER,  
Notary Public in and for the County of  
Los Angeles, State of California.

[Endorsed]: Filed Dec. 2, 1949.

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United States District Court, Southern District of  
California, Central Division  
No. 8960-C Admiralty

JOSEPH ANCICH, et al.,

Libelants,

vs.

D/S "MARSHA ANN," etc., et al.,

Respondents.

### DISMISSAL

On the oral motion of intervening libelant Sam Bilas, made during the course of the trial, there being no objection by other parties:

It Is Ordered that the third cause of action set forth in the intervening libel herein filed by said



Sam Bilas be and it is dismissed, as to the said Sam Bilas only.

Dated: December 19, 1949.

/s/ JAMES M. CARTER,  
U. S. District Judge.

Dismissal entered December 21, 1949.

Docketed December 21, 1949.

[Endorsed]: Filed December 20, 1949.

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[Title of District Court and Cause.]

MINUTE ORDER—MAY 31, 1950

Calendar of: Hon. James M. Carter,  
District Judge.

This cause having been taken under submission as to certain remaining issues, and the court having duly considered the matter, the court now hands down its memorandum of decision and finds in favor of libelants and intervening libelants and against respondents on said issues, and, pursuant to the oral decision rendered December 19, 1949, and the said memorandum of decision filed this date,

It Is Ordered that judgment will be in favor of libelants and intervening libelants and against respondents; counsel for libelants will prepare and submit findings of fact, conclusions of law and judgment, pursuant to local Rule 7, within ten days.

Copies mailed to counsel 5-31-5.



[Title of District Court and Cause.]

## MEMORANDUM OF DECISION

James M. Carter, District Judge:

In the above-entitled matter the Court heretofore found the "Marsha Ann" was negligent and at fault.

The remaining issues in the case are decided as follows:

(1) The "Bear" was not negligent or at fault.

(a) There is evidence that the required fog signal was being given.

(b) Additional signals, even if not required, did not contribute to the happening of the collision.

(c) The Court finds that the "Bear" was not traveling at an excessive speed under all the circumstances.

(d) The Court finds that the "Bear" was stopping her engines and navigating with caution.

(e) The "Bear" reversed her engines immediately on sighting the "Marsha Ann."

(f) Under the circumstances of this case, Article 19 does not apply.

(g) The position of the lookout of the "Bear" on the open bridge was reasonable and proper under all the circumstances of the case.

(h) The position of the "Bear's" lookout did not contribute to the collision; it would

have happened regardless of where the lookout was stationed.

(2) As to damage:

(a) The "Bear's" proof showed:

\$17,770.67 for repairs

507.94 surveyor's bill

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\$18,278.61

(b) Williams' testimony showed that ninety frames (forty-four plus forty-six) were in such condition that they would have had to be replaced regardless of collision.

(c) The Court finds replacing of these ninety frames not necessary and proximate result of collision.

(d) The Court finds that the cost per frame for replacing is \$40.00 per frame; \$40.00x90 equals \$3,600.00.

(e) Damage is allowed to the "Bear" in the sum of \$18,278.61, less \$3,600.00.

(f) The Court finds thirty-five work-days a reasonable time for repair, plus three days for bids.

(3) The Court determines that the libeling fishermen are entitled to recover against the "Marsha Ann."

(4) If the parties do not agree as to the amount of award to the fishermen, the matter will be referred to Howard V. Calverley, as commissioner.

(5) Findings and decree will be in accordance with this memorandum and the Clerk will enter suitable minute order therefor pursuant to the rules.

[Endorsed]: Filed May 31, 1950.

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At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 18th day of July, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,  
District Judge.

[Title of Cause.]

#### MINUTE ORDER

It appearing that the Court's decision filed May 31, 1950, in the above-entitled cause did not contain a specific ruling on the objection of respondent made at the trial to the introduction of any evidence on behalf the libeling fishermen as to damages for loss of prospective catch, on the ground that the libeling fishermen have failed to state a claim upon which relief can be granted, now, therefore, to clarify the record,

It Is Ordered, nunc pro tunc May 31, 1950, that the said objection be and it is overruled.

Opinion relative to the rights of fishermen employed upon a lay plan has been filed this date.

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[Title of District Court and Cause.]

## OPINION

James M. Carter, U. S. District Judge.

This decision concerns the right of fishermen employed upon a lay plan to maintain a libel in rem and in personam in their own names against a vessel which negligently collided with the vessel on which they were employed, and thereby caused them to lose their share of a prospective catch of fish during the repair of their vessel.

The "Bear" and the "Marsha Ann," fishing vessels of 65 feet and 100 feet in length respectively, collided in the fog two miles off the breakwater of Los Angeles harbor on the morning of November 30, 1948. Ten days later seven of the fishermen on the "Bear" filed a libel in rem and in personam for damages and maintenance against the "Marsha Ann" and her owners. The crew of the "Bear" consisted of the two owners, Korgan and Bilas, and nine fishermen. The fishermen were employed on which is commonly known as a lay plan under which their compensation (instead of wages), was to be a share of the proceeds resulting from the fishing venture. The two owners also had shares, both as owners and as fishermen.

Subsequently Korgan and Bilas, owners of the "Bear," filed an intervening libel against the same respondents seeking recovery only for the damages

sustained by their vessel and the cost of repair.

Then on December 2, 1949, almost a year later, but before trial, the two owners of the "Bear" joined by the two remaining fishermen on that vessel, filed another intervening libel in which the owners sought to recover damages for the loss of the use of the "Bear" during the remainder of the fishing season and also their share of the probable catch as fishermen, in addition to their share as owners. The two remaining fishermen libelled for their respective shares also.

The cumulative result of the original libel by the "Bear's" fishermen, and two subsequent intervening libels was an action in rem and in personam against the "Marsha Ann" and her owners by the two owners of the "Bear" and her nine fishermen. The owners sought to recover for damages to their vessel, loss of her use, and their shares of the probable catch for the remainder of the fishing season, both as owners and as fishermen. The nine fishermen prayed that they be allowed to recover their shares of the expected but unrealized profits of the venture.

The respondents answered by general denial, and at the start of the trial, by stipulation, the "Marsha Ann" and her owners were permitted to amend their answers by the addition of a further defense to the effect that the original libel of the seven fishermen and the intervening libels of the remainder of the "Bear's" crew failed to state a cause of action upon which relief could be granted, and



in particular that the fishermen did not allege that they owned the boat or the fish, nor did they allege any tort injury to themselves. It was the further contention of the respondents that the fishermen's rights are solely those of contract; that the fishermen's showing would consist of evidence that the "Marsha Ann" negligently interfered with that right and that although courts will give relief for intentional interference with contract rights, relief for negligent interference with contract rights will not be granted.

In support of their argument the respondents rely on *Robbins Dry Dock and Repair Co. v. Flint*, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927). In that case the owners of a vessel time-chartered her to libelants. The owners docked her with a dry-docker under a provision of the charter providing for docking every six months and suspending payment for hire during the period of this service. The dry-docker negligently broke the propeller, causing the ship to be laid up longer than anticipated. The time charterers libelled the vessel for damage for loss of use. The district court allowed recovery and the court of appeals affirmed. The dry-docker then sought certiorari. The Supreme Court, in reversing, held that a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the wrongdoer.

We hold that the decision in the *Robbins* case is not controlling. The facts in the case at bar are



entirely different. Fishermen, serving on a vessel under a lay plan, where their compensation for services is dependent upon the success of the venture, are not charterers. *The Carrier Dove*, 97 Fed. 111, 38 C.C.A. 73. Nor is there any contractual relation between their employer and the tortfeasor as in the *Robbins* case between the owners and the dry-docker. The damages which the charterers sought to recover from the dry-dockers in the *Robbins* case consisted of the profits they would have realized from other sources in no way connected with the use of the boat by the owner, the person in possession.

In the *Robbins* case, the Supreme Court said, p. 309:

“\* \* \* The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in that event the owners would have been trustees for the respondents to the extent of the respondents' share, and that no injustice would be done to allow the respondents to recover their share by direct suit \* \* \*”

and then rejected this theory.

The law is otherwise in the case of seamen employed upon a lay plan, and recovery may be had

by the owner of the vessel in behalf of the fishermen for their prospective share of the catch. *Taber v. Jenny*, Fed. Cas. No. 13720, (D. C. Mass.-1856); *U. S. v. Laffin*, 24 F. 2d 683 (1928).

It is well settled law that damages for the detention of a commercial vessel are to be measured by the profits which the owner would have realized from her use, had she been free.

*The Potomac*,

105 U.S. 630, 26 L. Ed. 1194 (1881);

*The Conqueror*,

166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937  
(1897);

*The Woolsum*,

14 F. 2d 371 (1926);

*The Priscilla*,

27 F. 2nd 921 (1928).

In the case of fishing vessels, probable earnings, when proven with reasonable certainty, are included as an item of damages arising from a tortious detention.

*The Mary Steele*,

Fed. Cas. No. 9226 (D. C. Mass.-1874);

*The Columbia*,

Fed. Cas. No. 3035 (D. C., E. D. N. Y.-  
1877);

*Oriel v. Sea Owl*,

1948 A.M.C. 445;

Pacific Steam Whaling Co. v. Alaska Packers Assn.;  
138 Cal. 632 (1903).

We entertain no doubt but that the owners of the "Bear" could libel the "Marsha Ann," and any damages recovered would include the anticipated earnings of the "Bear" for the period she was undergoing repairs. And the crewmen, being entitled by the terms of the lay plan to a share of the profits, would be able to assert their claim to their aliquot portion of the amount recovered by the owner. See *U. S. v. Laffin*, *supra*. In that case the owner of a sealing vessel, operating under a lay plan, recovered damages from the United States for unwarranted interference with the ship's sealing operations. The award of the Court included expected earnings, and the owner was made trustee thereof for the satisfaction of the crewmen's claims. Thus, eventually, the crewmen recovered their loss by sharing in the recovery of the owner. Although the action was brought under a special statute, (June 7, 1924, 43 Stat. 595, 28 USCA, §52, the Court held that the statute "must be presumed to have been enacted in view of the well settled principles applicable to the owner's right to represent the crew in such cases" and permitted the owner to bring the action as a representative of the crew.

The *Laffin* case, *supra*, states also in general terms, p. 685:

"\* \* \* it is equally well stated that neither officers nor members of the crew may join

with the owners in a recovery of the proceeds of the voyage and that the owners of the vessel and projectors of the voyage are the owners of the products thereof \* \* \*”

In support thereof is cited:

Baxter v. Rodman,  
3 (Mass.) Pick. 435;

Grozier v. Atwood,  
4 (Mass.) Pick. 234;

Tabor v. Jenney,  
Fed. Cas. No. 13720, 1 Spr. 315, 322.

The dire results foreseen in these cases if members of a crew on a lay plan were permitted to sue are not applicable to the case at bar. The Baxter case refers to the fact that if each seaman was a tenant in common with the other seamen and the owners in the fruits of the fishing voyage, “no action can be brought respecting it (the whaling oil) without joining all and none can be sued without the whole, giving every seaman the right to discontinue the action or to release the claim or to receive payment of the whole.” In our case, all the fishermen have joined in the action. All interested parties are before the Court. But if all the fishermen had not joined in the libel, an admiralty court has the authority to join as co-libelants all the fishermen having a cause of complaint of the same kind to minimize litigation and to adjudicate all interests of a similar nature.

The language of the Baxter case, *supra*, quoted

in the Laffin case, *supra*, refers to both joint ownership and tenancy in common, and makes no adequate distinction between them. The claim of the fishermen is a claim to his undivided share of the catch,—at most, a tenancy in common. As such a tenant in common, he would have no right to “discontinue the action or to release the claim” as to all, or “to receive payment of the whole.” The anticipated procedural difficulties predicted in the Baxter case fails to impress us and is far outweighed by the equity and expediency gained by allowing the fishermen to sue in their own name.

In *The Mary Steele*, *supra*, the owners and the crew were both parties to the libel and in *The Columbia*, *supra*, the report of the commissioner, exceptions to which were overruled, allowed “the seamen who libelled for their share, 1/6 of the catch so estimated.” These two cases, although not sustaining the right to a cause of action in the crew alone, throw doubt upon the broad statement contained in the Laffin case “that neither the officers nor members of the crew may be joined with the owners in a recovery of the proceeds of a voyage.”

It has long been recognized that the admiralty courts in the administration of justice, deal liberally with seamen. Seamen are the special wards of admiralty because of the nature of their services and its accompanying dangers. (Benedict on Admiralty, 6th Edition, Sec. 621.) The maritime courts having jurisdiction over seamen, have for generations made every effort to protect their rights



and interests. Admiralty rules of pleading are to be liberally construed and in dealing with sailors' rights, admiralty will grant them relief if justice is served, and adjudge their rights where equity and expediency are gained. While an admiralty court does not have general equitable jurisdiction, it acts upon equitable principles and should give relief where a court of equity would relieve and a court of law would not.

Benedict on Admiralty,  
6th Edition, Sec. 223.

Watts v. Camors,  
115 U. S. 353, 6 S. Ct. 91, 29 L. Ed. 406  
(1885);

U. S. v. Cornell Steamboat Co.,  
202 U. S. 184, 26 S. Ct. 648, 50 L. Ed. 987  
(1906);

Van Kamp Sea Food Co. v. Di Leva,  
171 F. 2d 454 (1948).

In *Van Kamp Sea Food Co. v. Di Leva*, *supra*, the sharesmen were allowed to maintain a libel for loss of earnings due to the lay up for repairs of their vessel from a collision caused by the negligent navigation of another vessel also owned by their employer. But the right of action was allowed the fishermen because the respondent owned both boats. The Court reasoned that the respondent could not be expected to sue itself for the benefit of the fishermen, hence the action was allowed on equitable principles. Judge Denman cut through legal



form and procedure, and said in substance: Since the fishermen in justice and equity have an ultimate claim to their prospective share of the catch, then they may maintain a cause of action in their own names.

In equity and justice, why should the recovery of loss of profits by seamen serving under the lay plan be contingent on the action taken by their employer?

These fishermen have suffered serious damage as a result of the collision. They have no right of recovery against their master or the owner of the boat unless he be at fault. *Reed v. Hussey*, (1836) Fed. Case No. 11646. Their contract of employment is terminated by operation of maritime law upon the breaking up of the voyage as a result of the collision. *The Elk*, 1938 A.M.C. 714. To refuse them the right to sue in their own names, places them at the whim and caprice of their employer and may involve conflicting interests. Upon the trial of the libel herein both the "Marsha Ann" and the "Bear" might be held negligent. True, the fishermen named only the "Marsha Ann" and not the "Bear." However, a recovery by them against the "Marsha Ann," if the "Bear" was also found negligent, would give the "Marsha Ann" a right to contribution from the "Bear." Had the owners of the "Bear" sued in behalf of the fishermen, it is arguable that there might have arisen conflicts of interests in the prosecution of the libel. These conflicts do not arise when the fishermen sue in their own names.

Benedict on Admiralty, 6th Edition, §230 states:

“§230. The Parties. \* \* \* There are no special Admiralty Rules concerning the capacity of parties, whether as infants, incompetents, agents, foreign corporations and the like. In these matters the admiralty courts have largely followed the local State practice; but as they are fully covered by the Federal Civil Rules, it would seem logical for the admiralty side of the court to apply Civil Rule 17, which expresses what the admiralty practice has actually been, namely: That actions shall be prosecuted in the name of the real party in interest; \* \* \*”

And in §245:

“The party really entitled to the relief should always be made libellant. There is no Admiralty Rule to this effect, but the practice is of long standing. The Civil Rules put it still more sharply and say that every action shall be prosecuted in the name of the real party in interest: Rule 17(a) \* \* \*”

Certainly the fishermen are the real parties in interest in such an action as this, and as such should be the parties to bring the libel. To restrict the right of recovery of future profits to the owner of the injured fishing vessel, and to make the fishermen's recoupment dependent upon the owner's successful exercise of that right is to deny a cause of action to the real persons in interest and channels the money rightfully due the fishermen through

a third party who is ultimately entitled only to a fractional portion thereof. Aside from the physical damages suffered to the boat, the nature of the losses sustained by owners and fishermen are identical. In amount, the claims of the fishermen usually greatly exceed those of the owner.

For the reasons set forth above, we hold that where all the fishermen of a vessel serving under a lay plan, have joined as parties libelant to recover their share of a prospective catch, they have a cause of action which can be maintained in their names in the district court.

[Endorsed]: Filed July 18, 1950.

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[Title District Court and Cause.]

### FINDING OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Honorable James M. Carter, United States District Judge, in the above-entitled Court on December 8th, 9th, 13th, 14th and 19th, 1949, upon the issues raised by the libel (hereinafter referred to as the Ancich libel) of Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulin, Ray Zukowski and William T. Decker, who were represented by David A. Fall, Esq.; the intervening libel (hereinafter referred to as the Korgan libel) of George Korgan and Sam Bilas, who were represented by Messrs. Lillick,

Geary & McHose by William A. C. Roethke, Esq.; the intervening libel (hereinafter referred to as the Hoopes libel) of W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, who were represented by Messrs. Ekdale & Shallenberger by Gordon P. Shallenberger, Esq.; and the answers thereto of the respondents, Oil Screw Marsha Ann, her engines, tackle, apparel, furniture, etc., and Jack Borcich, Andrew Vilicich and Bortul Zankich, who was represented by Messrs. Tripp & Calloway by Hulen C. Calloway, Esq.; and

Evidence, both oral and documentary, having been received by the Court and the matter having been argued by counsel both orally and upon written briefs; and

The Court after consideration of the evidence and the law and the arguments of counsel, and having been fully advised in the premises, and having taken the matter under submission, and having filed its minute order of May 31, 1950, and a memorandum of decision that same day, and an opinion filed July 18, 1950, for judgment in favor of libelants and intervening libelants and against respondents, now makes its Findings of Fact and Conclusions of Law, as follows:

### Findings of Fact

#### I.

The court finds that the allegations of Article I of the Ancich libel are true, save and except that the section of Title 28, United States Code should read 1916 rather than 837.

## II.

The Court finds that the Bear is an oil screw fishing vessel and George Korgan and Sam Bilas were the sole and only owners thereof at all times mentioned in the Ancich, Korgan and Hoopes libels.

## III.

The Court finds that the Marsha Ann is an oil screw fishing vessel and Jack Borcich, Andrew Vilicich and Bortul Zankich were the sole and only owners thereof at all times mentioned in the Ancich, Korgan and Hoopes libels.

## IV.

The Court finds that on November 30, 1948, at or about the hour of 11:30 a.m., a collision occurred between the Bear and the Marsha Ann as a point approximately 2 miles southeast of the Los Angeles Harbor Breakwater Light; and that as a result of said collision the various libelants and intervening libelants sustained damage as hereinafter more particularly set out.

## V.

The Court finds that the facts pertinent to said collision are as follows: The Bear was proceeding at a speed of about 11½ miles per hour in a general northwesterly direction toward and about 2 miles southeast of the Los Angeles Harbor Breakwater Light. A heavy fog was laying off the coast in this vicinity enveloping the movements of vessels in the area. At the time of the collision and for more than an hour preceding the same, the Bear was



sounding fog signals in compliance with the applicable Rules of the Road. Whistles of other vessels were heard in the vicinity of the Bear as a result of which the Bear alternately stopped and then proceeded with caution at a speed of approximately 11½ miles per hour. While so navigating, the Marsha Ann appeared from out of the fog, broad on the starboard beam of the Bear at a distance of about 40 feet; that the speed of the Marsha Ann at the time of sighting the Bear was immoderate and unwarranted under the circumstances and constituted negligence. Before any steps could be taken to avert or minimize the collision, the Marsha Ann struck the Bear at almost a right angle on the starboard side of the Bear just abaft the deck house at which time the Bear was virtually dead in the water.

## VI.

The Court finds that the Marsha Ann was equipped with radar and that the Bear was not; that the Marsha Ann picked up the Bear on its radar some minutes before the collision but at no time prior to impact did the Marsha Ann take any steps to avoid the collision by reversing her engines or coming to a complete stop.

## VII.

The Court finds that the foregoing faults and negligence of the Marsha Ann, especially her excessive speed through the water, were the direct and sole cause of the collision and of the damage resulting therefrom.



## VIII.

The Court finds that the Bear prior to and at the time of said collision was seaworthy and was properly equipped and supplied, manned by a competent crew and was well and carefully navigated, was maintaining a proper and efficient lookout and was observing all of the rules and regulations applicable to a vessel in her situation.

## IX.

The Court finds that the Bear was not negligent or at fault in any respect contributing to the collision.

## X.

The Court finds that:

(a) The required fog signal was being given by the Bear.

(b) Additional signals by the Bear, even if not required, did not contribute to the happening of the collision.

(c) The Bear was not traveling at an excessive speed under all the circumstances.

(d) The Bear was stopping her engines and navigating with caution.

(e) The Bear reversed her engines immediately on sighting the Marsha Ann.

(f) Under the circumstances of this case, Article 19 of the International Rules does not apply.

(g) The position of the lookout on the Bear on the open bridge was reasonable and proper under all the circumstances of the case.

(h) The position of the Bear's lookout did not contribute to the collision; it would have happened regardless of where the lookout was stationed.

## XI.

The Court finds that the prospective catch which the Bear would have made, and for which damage is allowable, for the period of the thirty-eight (38) days which was the reasonable lay-up time for the bids and repairs to the Bear, would have been 270 tons; that the price per ton of fish was \$50.00, making a total loss of catch in the amount of \$13,500.00; that the crew members of the Bear were fishing on a lay of 68% for the crew and 32% for the Bear; that the intervening libelants George Korgan and Sam Bilas are entitled to the sum of \$4,320.00, as damage against the respondents for loss of use of the Bear for the period of 38 days; that the following libelants as crew members of the Bear sustained damage on account of loss of fishing time in the amount set down opposite their respective names:

John Ancich .....	\$918.00
John Kaiza .....	\$918.00
Anton Bogdanovich .....	\$918.00
Peter Svorinich .....	\$918.00
Martin Miskulian .....	\$918.00
Ray Zukowski .....	\$918.00
William T. Decker .....	\$918.00
George Korgan .....	\$918.00
Nick Milosevich .....	\$918.00
W. H. Hoopes .....	\$418.00

## XII.

The Court finds that as a result of said collision the following expenditures were reasonably incurred by libelants George Korgan and Sam Bilas:

(a) For repairs to Bear.....	\$17,770.67
(b) Surveyors' fees .....	507.94

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Total .....	\$18,278.61
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## XIII.

The Court finds that 90 frames of the Bear were in such condition that they would have had to be replaced regardless of collision and that the replacing of the same was not the necessary and proximate result of the collision; that the cost of replacing each frame was \$40.00 or a total of \$3,600.00; that damage is allowed libelants George Korgan and Sam Bilas in the sum of \$18,278.61, less \$3,600.00, or \$14,678.61.

## XIV.

That pursuant to a dismissal of the claim of intervening libelant Sam Bilas for a share of wages, he is not entitled to recover any amount therefor.

## XV.

That pursuant to testimony of W. H. Hoopes that he earned \$500.00 during the time the Bear was laid up undergoing repairs, it was stipulated that his recovery be reduced by that amount; hence the amount set opposite his name in Finding Number XI hereinabove.

### Conclusions of Law

And as Conclusions of Law from the foregoing facts, the Court finds:

1. The Bear committed no fault or negligence in the premises.

2. The Marsha Ann's negligent navigation, and faults were the sole and proximate cause of the collision.

3. That the following libelants, and each of them, is entitled to a decree against the respondents for loss of wages in the amounts set opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum, to wit:

John Ancich .....	\$918.00
John Kaiza .....	\$918.00
Anton Bogdanovich .....	\$918.00
Peter Svorinich .....	\$918.00
Martin Miskulian .....	\$918.00
Ray Zukowski .....	\$918.00
William T. Decker .....	\$918.00
George Korgan .....	\$918.00
W. H. Hoopes .....	\$418.00
Nick Milosevich .....	\$918.00

4. That intervening libelants George Korgan and Sam Bilas are entitled to a decree against respondents in respect of the damage to the Bear for the total sum of \$14,678.61, together with interest at 7% per annum on the amount of \$14,170.67 from November 30, 1948.

5. That intervening libelants George Korgan and Sam Bilas are entitled to a decree against respondents for loss of use of the Bear in the amount of \$4,320.00, together with interest thereon at 7% per annum from November 30, 1948.

6. That said libelants and intervening libelants, and each of them, are entitled to their costs of suit herein incurred.

Let a final decree be entered accordingly.

Dated: Los Angeles, California, September 13, 1950.

/s/ JAMES M. CARTER,

United States District Judge.

[Endorsed]: Filed Sept. 13, 1950.

In the District Court of the United States, Southern  
District of California, Central Division

In Admiralty No. 8960-C

JOSEPH ANCICH, et al.,

Libelants,

vs.

D/S "MARSHA ANN," Her Engines, Tackle, Appa-  
rel, Furniture, Etc., and JACK BORICH,  
et al., Her Owners,

Respondents.

GEORGE KORGAN and SAM BILAS,

Intervening Libelants,

vs.

OIL SCREW, "MARSHA ANN," Her Engines,  
Tackle, Apparel, Furniture, Etc., and JACK  
BORICH, ANDREW VILICICH, BORTUL  
ZANKICH, et al.,

Respondents.

W. H. HOOPES, NICK MILOSEVICH,  
GEORGE KORGAN and SAM BILAS,

Intervening Libelants,

vs.

OIL SCREW, "MARSHA ANN," Her Engines,  
Tackle, Apparel, Furniture, Etc., and JACK  
BORICH, ANDREW VILICICH, BORTUL  
ZANKICH, et al.,

Respondents.

### FINAL DECREE

By reason of the law and Findings of Fact on



file herein, It Is Hereby Ordered, Adjudged and Decreed:

### I.

That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, the amount set down opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit:

John Ancich .....	\$918.00
John Kaiza .....	\$918.00
Anton Bogdonovich .....	\$918.00
Peter Svorinich .....	\$918.00
Martin Miskulin .....	\$918.00
Ray Zukowski .....	\$918.00
William T. Decker .....	\$918.00
George Korgan .....	\$918.00
W. H. Hoopes .....	\$418.00
Nick Milosevich .....	\$918.00

### II.

That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann, and from Jack Borcich, Andrew Vilicich and Bortul Zankich, in respect of the damages to the Bear, the sum of \$14,678.61, together with interest from November 30, 1948, at 7% per annum on the amount of \$14,170.67 until paid.

### III.

That intervening libelants George Korgan and

Sam Bilas do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vili-cich and Bortul Zankich in respect of the loss of use of the Bear the sum of \$4,320.00, together with interest thereon at 7% per annum from November 30, 1948, until paid.

IV.

That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, their costs of suit herein incurred as follows:

(a) Libelants John Ancich, John Kaiza, Anton Bogdonovich, Peter Svorinich, Martin Miskulin, Ray Zukowski, William T. Decker, George Korgan, W. H. Hoopes and Nick Milosevich, \$36.50.

(b) Intervening libelants George Korgan and Sam Bilas, \$66.30.

(c) Intervening libelants W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, \$30.00.

Dated: Los Angeles, California, this 13th day of September, 1950.

/s/ JAMES M. CARTER,

United States District Judge.

Judgement entered September 14, 1950.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 13, 1950.

[Title of District Court and Cause.]

PETITION FOR APPEAL AND ORDER  
ALLOWING APPEAL

To the Honorable the Judges of the United States  
Court of Appeals for the Ninth Circuit:

The petition of Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-Owners of the Oil Screw Marsha Ann, respectfully, shows as follows:

I.

That on or about the 9th day of December, 1948, the libelants herein filed their libel in the District Court of the United States for the Southern District of California against the D/S "Marsha Ann," her engines, tackle, apparel, furniture, etc., and Jack Borcich, Andrew Vilicich and Bortul Zankich, in a libel in rem and in personam for damages, wages and maintenance, civil and maritime, to recover \$1,800.00 for each libelant for damages, wages and maintenance, as by reference to the said libel will more fully appear.

II.

That on or about the 27th day of December, 1948, the intervening libelants George Korgan and Sam Bilas filed their intervening libel in the District Court of the United States for the Southern District of California against the Oil Screw "Marsha Ann," her engines, tackle, apparel, furniture, etc., and Jack Borcich, Andrew Vilicich and Bortul Zankich, in an intervening libel in rem and in per-

sonam for collision damage to recover \$20,000.00 for costs of repair to the Oil Screw Bear, as by reference to said intervening libel will more fully appear.

### III.

That on or about the 2nd day of December, 1949, the intervening libelants W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas filed their intervening libel in the District Court of the United States for the Southern District of California against the Oil Screw "Marsha Ann," her engines, tackle, apparel, furniture, etc., in an intervening libel in rem and in personam for collision damage to recover \$5,000.00 for loss of profits by reason of detention and for \$1,500.00 each for W. H. Hoopes and Nick Milosevich for damages by reason of inability to secure employment during the aforesaid detention period, as by reference to the said intervening libel will more fully appear.

### IV.

That on or about the 10th day of January, 1949, the respondents filed herein their answer to the libel and on the 12th day of January, 1949, respondents filed their answer to the intervening libel of George Korgan and Sam Bilas and on the 2nd day of December, 1949, a stipulation was entered into by all of the parties hereto, through their respective counsel wherein it was stipulated that the answers of respondents already on file be deemed to be a complete answer to the libel of the intervenors W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, save and except as to the

damage allegations and as to those allegations it was stipulated that they be deemed denied by respondents as though formal pleadings were on file herein; that on the 2nd day of December, 1949, an order was signed allowing the said stipulation and ordering the same filed.

That such proceedings were thereafter had in this case on the 8th, 9th, 13th, 14th, 15th and 19th days of December, 1949, this cause came on for trial and argument before Honorable James M. Carter, District Judge, at the courtroom of said Court, in the United States Court House, Los Angeles, California, and at the close of said trial the Court rendered its decision, holding the "Marsha Ann" and Jack Borcich, Andrew Vilicich and Bortul Zankich solely at fault for the collision and damages set forth in the libel and intervening libels. Thereafter, on September 14, 1950, a final decree was made and entered in this case whereby it was ordered, adjudged and decreed:

"I.

"That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, the amount set down opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit:

John Ancich .....	\$918.00
John Kaiza .....	918.00
Anton Bogdonovich .....	918.00



Peter Svorinich .....	\$918.00
Martin Miskulin .....	918.00
Ray Zukowski .....	918.00
William T. Decker .....	918.00
George Korgan .....	918.00
W. H. Hoopes .....	418.00
Nick Milosevich .....	918.00

## “II.

“That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann, and from Jack Borcich, Andrew Vili-  
cich and Bortul Zankich, in respect of the dam-  
ages to the Bear, the sum of \$14,678.61, together  
with interest from November 30, 1948, at 7% per  
annum on the amount of \$14,170.67 until paid.

## “III.

“That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vili-  
cich and Bortul Zankich in respect of the loss of  
use of the Bear the sum of \$4,320.00, together with  
interest thereon at 7% per annum from November  
30, 1948, until paid.

## “IV.

“That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, their costs of suit herein in-  
curred.”



## VI.

That these petitioners, Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-owners of the Oil Screw Marsha Ann, are advised and believe that said final decree and the said decision whereon it was rendered are erroneous, in that said decision did not adjudge and said final decree did not decree the relief prayed for in the said answers to the libel and intervening libels herein, and did not decree that said libel and intervening libels be dismissed as to these petitioners with costs.

Your petitioners therefore pray that they may be allowed to appeal from said final decree to the next term of the Court of Appeals for the Ninth Circuit, and that a transcript of record of the proceedings and papers upon which said decree was made, duly authenticated, may be sent accordingly to said Court of Appeals, and that the usual citation may issue in order

(1) That the said decree may be reviewed and may be modified, by said Court of Appeals, insofar as it orders and decrees the several matters alleged as error in the assignments of error herewith filed;

(2) That the conclusions of law of the said District Court herein may be reviewed and modified, by the said Court of Appeals, insofar as the said District Court herein concluded erroneously as alleged in the assignments of error herewith filed;

(3) That the findings of fact of the said District Court herein may be reviewed in part and may be modified, by the said Court of Appeals, insofar as

the said District Court herein found the facts alleged as error in the assignments of error herewith filed.

JACK BORCICH, ANDREW VILICICH and  
BORTUL ZANKICH, Co-Owners of the Oil  
Screw Marsha Ann.

By /s/ HULEN C. CALLAWAY,  
Proctor for Petitioners.

### ORDER

It Is Ordered that the appeal herein be allowed as prayed for.

Dated this 26th day of October, 1950.

/s/ JAMES M. CARTER,  
U. S. District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 26, 1950.

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[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

The petitioners Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-Owners of the Oil Screw Marsha Ann, hereby assign error in the proceedings, findings, conclusions, decrees, orders and decisions of the District Court in the above-entitled action as follows:

First: The District Court erred when it ordered, adjudged and decreed:

That the following libelants, as crew members of the Bear, do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, the amount set down opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum until paid, to wit:

John Ancich .....	\$918.00
John Kaiza .....	918.00
Anton Bogdonovich .....	918.00
Peter Svorinich .....	918.00
Martin Miskulin .....	918.00
Ray Zukowski .....	918.00
William T. Decker.....	918.00
George Korgan .....	918.00
W. H. Hoopes.....	418.00
Nick Milosevich .....	918.00

That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann, and from Jack Borcich, Andrew Vilicich and Bortul Zankich, in respect of the damages to the Bear, the sum of \$14,678.61, together with interest from November 30, 1948, at 7% per annum on the amount of \$14,170.67 until paid.

That intervening libelants George Korgan and Sam Bilas do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich in respect of the loss of use of the Bear the sum of \$4,320.00, together with

interest thereon at 7% per annum from November 30, 1948, until paid.

That libelants and intervening libelants do have and recover from the Oil Screw Marsha Ann and from Jack Borcich, Andrew Vilicich and Bortul Zankich, their costs of suit herein incurred.

Second: The District Court erred when it concluded:

(1) That the Bear committed no fault or negligence in the premises;

(2) That the Marsha Ann navigated negligently or committed any faults which were the sole and proximate cause of the collision;

(3) That the following libelants, and each of them, is entitled to a decree against the respondents for loss of wages in the amounts set opposite their respective names, together with interest thereon from November 30, 1948, at 7% per annum, to wit:

John Ancich .....	\$918.00
John Kaiza .....	918.00
Peter Svorinich .....	918.00
Martin Miskulian .....	918.00
Ray Zukowski .....	918.00
William T. Decker.....	918.00
George Korgan .....	918.00
W. H. Hoopes.....	418.00
Nick Milosevich .....	918.00
Anton Bogdanovich .....	918.00

(4) That intervening libelants George Korgan

and Sam Bilas are entitled to a decree against respondents in respect of the damage to the Bear for the total sum of \$14,678.61, together with interest at 7% per annum on the amount of \$14,170.67 from November 30, 1948.

(5) That intervening libelants George Korgan and Sam Bilas are entitled to a decree against respondents for loss of use of the Bear in the amount of \$4,320.00, together with interest thereon at 7% per annum from November 30, 1948.

(6) That said libelants and intervening libelants, and each of them, are entitled to their costs of suit incurred herein.

Third: The District Court erred when it did not conclude that the Oil Screw Bear was solely at fault in the said collision.

Fourth: The District Court erred when it found that the allegations of Article I of the Ancich libel are true.

Fifth: The District Court erred when it found that as a result of the said collision the libelants and intervening libelants sustained damage as alleged.

Sixth: The District Court erred when it found:

(1) That at the time of the said collision the Bear was proceeding at a speed of about 1 to 1½ miles per hour.

(2) That at the time of the said collision and for more than an hour preceding the same the Bear



was sounding fog signals in compliance with the applicable Rules of the Road.

(3) That the Bear alternately stopped and proceeded with caution at a speed of approximately 11½ miles per hour upon hearing whistles in the vicinity.

(4) That while so navigating the Marsha Ann appeared from out of the fog broad on the starboard beam of the Bear at a distance of about 40 feet.

(5) That the speed of the Marsha Ann at the time of sighting the Bear was immoderate and unwarranted under the circumstances and constituted negligence.

(6) That before any steps could be taken to avert or minimize the collision, the Marsha Ann struck the Bear at almost a right angle on the starboard side of the Bear just abaft the deck house.

(7) That at the time of the said collision the Bear was virtually dead in the water.

Seventh: The District Court erred when it found that at no time prior to the impact did the Marsha Ann take any steps to avoid the collision by reversing her engines, or coming to a complete stop.

Eighth: The District Court erred when it found:

(1) That the Marsha Ann was negligent or committed any faults which were the direct and sole



cause of the collision and of the alleged damage.

(2) That the Marsha Ann was moving at an excessive speed at the time of the said collision.

Ninth: The District Court erred when it found:

(1) That the Bear prior to and at the time of said collision was seaworthy and was properly equipped and supplied.

(2) That the Bear was manned by a competent crew.

(3) That the Bear was well and carefully navigated.

(4) That the Bear was maintaining a proper and efficient lookout.

(5) That the Bear was observing all of the rules and regulations applicable to a vessel in her situation.

Tenth: The District Court erred when it found that the Bear was not negligent or at fault in any respect contributing to the collision.

Eleventh: The District Court erred when it found:

(1) That the required fog signal was being given by the Bear.

(2) That additional signals by the Bear, which were not required, did not contribute to the happening of the collision.

(3) That the Bear was not traveling at an excessive speed under all the circumstances.

(4) That the Bear was stopping her engines and navigating with caution.

(5) That the Bear reversed her engines immediately on sighting the Marsha Ann.

(6) That under the circumstances of this case, Article 19 of the International Rules does not apply.

(7) That the position of the lookout on the Bear on the open bridge was reasonable and proper under all the circumstances of the case.

(8) That the position of the Bear's lookout did not contribute to the collision; that it would have happened regardless of where the lookout was stationed.

Twelfth: The District Court erred when it found:

(1) That the prospective catch which the Bear would have made would have been 270 tons.

(2) That the period of 38 days was a reasonable lay-up time for bids and repairs to the Bear.

(3) That the intervening libelants George Korgan and Sam Bilas are entitled to the sum of \$4,320.00 as damages against the respondents for loss of use of the Bear for a period of 38 days.

Thirteenth: The District Court erred when it found that the following libelants as crew members of the Bear sustained damage on account of loss of fishing time in the amount set down opposite their respective names.

John Ancich .....	\$918.00
John Kaiza .....	918.00
Anton Bogdanovich .....	918.00
Peter Svorinich .....	918.00
Martin Miskulian .....	918.00
Ray Zukowski .....	918.00
William T. Decker.....	918.00
George Korgan .....	918.00
W. H. Hoopes.....	418.00
Nick Milosevich .....	918.00

Fourteenth: The District Court erred when it found that the intervening libelants George Korgan and Sam Bilas were damaged in the sum of \$14,-678.61 for repairs and surveyor's fees as a result of the said collision.

Dated this 26th day of October, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,  
Proctors for Respondents.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 26, 1950.

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### CITATION ON APPEAL

United States of America—ss.

To Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski and William T. Decker, Libelants, and to: David A. Fall, Esq., their proctor; and to George Korgan and Sam Bilas, Intervening

Libelants; and to: Lillick, Geary & McHose, William A. C. Roethke, Their Proctors; and to: W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, Intervening Libelants; and to: Arch E. Ekdale and Gordon P. Shallenberger, Their Proctors. Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 5th day of December, A.D. 1950, pursuant to an order allowing appeal filed on Oct. 26, 1950, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 8960-C, Central Division, wherein Jack Borcich, Andrew Vilicich and Bortul Zankich, co-owners of the D/V "Marsha Ann," are appellants and you are appellees to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Carter, United States District Judge for the Southern District of California, this 26th day of October, A.D. 1950, and and of the Independence of the United States, the one hundred and sixty.....

/s/ JAMES M. CARTER,

U. S. District Judge for the Southern District of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 26, 1950.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski and William T. Decker, Libelants; and to: David A. Fall, Esq., Their Proctor; and to George Korgan and Sam Bilas, Intervening Libelants; and to: Lillick, Geary & McHose, William A. C. Roethke, Their Proctors; and to: W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, Intervening Libelants; and to: Arch E. Ekdale and Gordon P. Shallenberger, Their Proctors.

Notice Is Hereby Given that Respondents hereby appeal to the Court of Appeals for the Ninth Circuit from the final decree entered in this action on September 14, 1950.

Dated: October 26, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,  
Proctors for Respondents.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 26, 1950.



[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Whereas, the appellants Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-Owners of the Oil Screw Marsha Ann, have filed, or are about to file, a notice of appeal and petition for appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the final decree entered by the District Court of United States for the Southern District of California in the above-entitled cause on September 14, 1950, and to supersede said final decree; and

Whereas, the said appellants are required to give an undertaking, under seal, in the sum of \$35,-805.97 conditioned for the satisfaction of the final decree in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the final decree is affirmed, and to satisfy in full any modification of the final decree and such costs, interest and damages as the appellate court may adjudge and award.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, Globe Indemnity Company, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellants that said Appellants will comply with the conditions as above set forth, and does further agree that upon default by the said Appellants in any of the con-



ditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this court shall direct; that this court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

In Witness Whereof, the said Globe Indemnity Company has caused these presents to be executed and its official seal attached by its duly authorized attorney in fact, at Los Angeles, California, this 24th day of October, 1950.

GLOBE INDEMNITY COMPANY.

[Seal] By /s/ A. A. CHRISTIAN,  
Attorney in fact.

The premium charged for this bond is \$358.06 dollars per annum.

Examined and recommended for approval as provided in Rule 8.

/s/ HULEN C. CALLAWAY,  
Attorney-at-Law.

State of California,  
County of Los Angeles—ss.

On this 24th day of October in the year 1950, before me, L. Hollingshead, a Notary Public in and for the County and State aforesaid, personally appear A. A. Christian, known to me to be the person whose name is subscribed to the within instrument and known to me to be the Attorney-in-Fact of

Globe Indemnity Company and acknowledged to me that he subscribed the name of the said Company thereto as surety, and his own name as Attorney-in-Fact.

[Seal]      /s/ L. HOLLINGSHEAD,  
Notary Public in and for Said  
County and State.

My Commsision Expires May 14, 1952.

I hereby approve the foregoing. Dated this 26th day of October, 1950.

/s/ JAMES M. CARTER,  
Judge.

[Endorsed]: Filed Oct. 26, 1950.

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[Title of District Court and Cause.]

### PRAECIPE

To Edmund L. Smith, Clerk of the United States District Court for the Southern District of California:

Come now the respondents Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-Owners of the Oil Screw Marsha Ann, and designate for inclusion the entire record and all the pleadings and evidence in the above-entitled action, including:

1. The libel in rem and in personam for damages, wages and maintenance.

2. Claim of Jack Borcich, et al.

3. Intervening libel in rem and in personam for collision damages (George Korgan and Sam Bilas, Intervening Libelants).

4. Claim of Jack Borcich, et al.

5. Answer to libel.

6. Answer to intervening libel of George Korgan and Sam Bilas.

7. Stipulation for permission to file intervening libel (W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas).

8. Intervening libel in rem and in personam for collision damages (W. H. Hoopes, Nick Milosevich, George Korgan and Sam Bilas, Intervening Libelants).

9. Pre-trial stipulation dated December 13, 1949.

10. The testimony, as taken on the part of the libelants, intervening libelants and respondents.

11. All exhibits of the libelants, intervening libelants and respondents.

12. Minute order dated May 31, 1950.

13. Opinion of Court filed July 18, 1950.

14. Findings of Fact and Conclusions of Law.

15. Minute order dated July 18, 1950.

16. Final decree.

17. Judgment dismissing third cause of action of Sam Bilas.

18. Citation on appeal, and affidavit of service thereof.

19. Supersedeas Bond.

20. Assignment of Errors.

21. Notice of appeal.

22. Petition for appeal and order allowing appeal.

23. Praeceptum for the apostles.

24. All written stipulations which shall be entered into by and between proctors for the respective parties, and all orders of the United States District Court based thereon, prior to completion and transmittal of the record on appeal to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

In preparing the record to be transmitted to the Circuit Court of Appeals, the Clerk will please omit all formal captions and title, except the captions on the Libel and Intervening Libels, substituting in the case of the omitted captions the words "Title of Court and Cause" and he shall omit all verifications, substituting therefor the word "verified."

Dated: November 6, 1950.

TRIPP & CALLAWAY,

By /s/ HULEN C. CALLAWAY,

Proctors for Respondents.

Affidavit of service by mail attached.

[Endorsed]: Filed Nov. 8, 1950.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 102, inclusive, contain the original Libel; Claim of Jack Borcich, et al., on Libel; Intervening Libel of George Korgan, et al.; Claim of Jack Borcich, et al., on Intervening Libel; Answer to Libel; Answer to Intervening Libel; Stipulation and Order for Permission to File Intervening Libel; Intervening Libel of W. H. Hoopes, et al.; Dismissal of Third Cause of Action in Intervening Libel as to Sam Bilas only; Memorandum of Decision; Opinion; Finding of Fact and Conclusions of Law; Final Decree; Petition for Appeal and Order Allowing Appeal; Assignment of Errors; Citation; Notice of Appeal; Supersedeas Bond; and Praecipe and a full, true and correct copy of minute orders entered May 31, 1950, and July 18, 1950, which, together with original Libelants' Exhibits 1 to 13 inclusive, 14A and 14B and original respondents' exhibits A to N, inclusive, O-1 and O-2, and original reporter's transcript of proceedings on December 8, 9, 13, 14 and 19, transmitted herewith, constitute the apostles on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing apostles amount to \$2.80 which sum has been paid to me by appellants.



Witness my hand and the seal of said District Court this 4th day of December, A.D. 1950.

EDMUND L. SMITH,  
Clerk.

[Seal] By /s/ THEODORE HOCKE,  
Chief Deputy.

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In the United States District Court, Southern  
District of California, Central Division  
No. 8960-C In Admiralty

JOSEPH ANCICH, JOHN KAIZA, ANTON  
BOGDANOVICH, PETER SVORINICH,  
MARTIN MISKULIAN, RAY ZUKOWSKI,  
and WILLIAM T. DECKER,

Libelants,

vs.

D/S "MARSHA ANN," Her Engines, Tackle, Ap-  
parel, Furniture, Etc., and JACK BORCICH,  
et al., her owners,

Respondents.

GEORGE KORGAN and SAM BILAS,  
Intervening Libelants,

vs.

Oil Screw "MARSHA ANN," Her Engines, Tackle,  
Apparel, Furniture, Etc., and JACK BOR-  
CICH, ANDREW VILICICH, BORTUL  
ZANKICH, et al.,

Respondents,



W. H. HOOPES, NICK MILOSEVICH, GEORGE  
KORGAN and SAM BILAS,

Intervening Libelants,

vs.

Oil Screw "MARSHA ANN," Her Engines, Tackle,  
Apparel, Furniture, Etc., and JACK BOR-  
CICH, ANDREW VILICICH, BORTUL  
ZANKICH, et al.,

Respondents.

Honorable James M. Carter, Judge Presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

THURSDAY, DECEMBER 8, 1949

Appearances:

Proctor for Libelants:

DAVID A. FALL, Esq.

Proctors for Intervening Libelants George Kor-  
gan and Sam Bilas:

MESSRS. LILLYCK, GEARY &  
McHOSE,

WM. A. C. ROETHKE, Esq.

Proctors for Intervening Libelants W. H.  
Hoopes, Nick Milosevich, George Korgan and  
Sam Bilas:

MESSRS. EKDALE & SHALLENBER-  
GER,

G. P. SHALLENBERGER, Esq.

Proctors for Respondents:

MESSRS. TRIPP & CALLAWAY,  
H. C. CALLAWAY, Esq., and  
F. V. LOPARDO, Esq.,

(Other court matters.)

The Clerk: Case No. 8960-C Admiralty.

Mr. Shallenberger: Are you ready, Mr. Callaway?

Mr. Callaway: Yes.

Mr. Shallenberger: There are two preliminary matters I would like to take up, your Honor. I would like at this time to amend or to make a motion to amend the cause of action for Mr. William Hoopes.

I found at a very late date that Mr. Hoopes had engaged in gainful employment during the period of time that the boat was detained, and that he made the sum of \$500, and I would like to amend Mr. Hoopes' cause of action to show a diminution of his damages in that amount.

Mr. Callaway: There will be no objection.

The Court: All right. The order will be so made. I don't think you need to even interline the pleadings. Can't we just let the record show the amendment has been made?

Mr. Shallenberger: Yes, your Honor. It is a matter that I would have alleged had I known about it in time.

I would, also, like at this time to move that all witnesses and parties be excluded from the court

room, and only those witnesses testifying remain, and the owners of the two respective vessels be permitted to remain. I am making this motion for the reason that there seems to be a situation here in which the facts are diametrically opposed to each other. About the only fact that is not is the fact that there was a collision, and that it was a collision between these two vessels. So I make that motion at this time.

Mr. Callaway: I have no particular objection.

The Court: Counsel, who can we exclude? You can't exclude the parties, can you?

Mr. Shallenberger: We are willing that all parties be excluded except the boat owners. Is that right, Mr. Fall?

Mr. Fall: Yes.

Mr. Shallenberger: That would only be fair, in view of the fact that most of our witnesses are parties and probably most of Mr. Callaway's are not.

Mr. Callaway: I have no particular objection.

The Court: All right. The order will be made that all witnesses will be excluded except the boat owners. The boat owners are Korgan and Bilas as to the Bear, and as to the Marsha Ann Jack Borcich, Andrew Vilicich and Bortul Zankich, is that right?

Mr. Callaway: Yes, sir.

The Court: Those five people will not be excluded; all other witnesses and libelants will be excluded. I suggest you remain handy in the witness room until called. The clerk will show you where you have to remain.

Mr. Callaway: Is there anything else, counsel?

Mr. Shallenberger: No.

Mr. Callaway: At this time——

The Court: Just a moment. Have we some witnesses here, libelants?

Mr. Callaway: We will tell the ones that should leave.

(Whereupon the witnesses were excluded from the court room.)

The Court: I will leave it to counsel at all times to have the responsibility of keeping their witnesses out.

Mr. Fall: One of our witnesses went to lunch.

Mr. Callaway: At this time, if the Court please, the respondents ask leave of Court to amend the answer to the libelants and intervening libelants who I will now name, namely, Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski, and William T. Decker, and the intervening libelants, W. H. Hoopes, and Nick Milosevich, to set up the additional defense, separate defense, that the libel and intervening libel fails to state a claim upon which relief can be granted.

Those are the fishermen represented by Mr. Fall, and the intervening libelants represented by Mr. Shallenberger.

The Court: Any objection to the amendment to set forth that defense?

Mr. Fall: I have no objection. It is a matter that the Court would have to pass on, in the first instance, to determine whether or not they did have a claim.

Mr. Callaway: I want to put it in in that form, and then if the Court wants to hear that point of law first, we are prepared to present it.

Mr. Shallenberger: If the Court please, the only objection I would have would be one of amplification, just what Mr. Callaway intends to encompass by such defense.

The way he has stated it it is a conclusion. If it is the point that was argued at the pretrial, I have no objection.

Mr. Callaway: That is the point, Mr. Shallenberger. I haven't any additional points.

The Court: The order will be made permitting the defense to be filed.

As a matter of fact, admiralty is the same as an ordinary law suit, you can raise the same thing by objecting to the introduction of any evidence.

Mr. Shallenberger: That is why we are not objecting.

The Court: We will permit the defense to be set forth, as it were, as an amendment to the answers that you filed to the libels and intervening libels.

Mr. Callaway: Very well.

As a matter of procedure, if the court desires us to handle it in that fashion, I think it should be disposed of first. I would suggest that the libelants call one witness and have him sworn, and then we will make it in the form of an objection to the introduction of any evidence on that subject.

The Court: Let's start to argue it right now and let's assume for the record that a witness was called and you made an objection.



Mr. Callaway: Will you so stipulate?

Mr. Shallenberger: Yes.

Mr. Fall: Yes.

Mr. Callaway: Mr. Lopardo will present the legal aspect of it, your Honor.

Mr. Lopardo: Your Honor, the libel of the fishermen heretofore named by Mr. Callaway, and the intervening libel of the fishermen heretofore named by Mr. Callaway, fails to state a claim upon which relief can be granted for the following reason: The fishermen here do not allege that they own the boat that was injured, they do not allege that they owned any fish which they lost, and they do not allege any direct injury to them by virtue of this tort.

An inspection of the various libels, intervening libels and answers in this case reveal that the tort, if any, was committed against the vessel, the vessel was hurt.

The other day at the pretrial hearing the court asked me how I would phrase the question herein involved, and I read the question as follows: Can these fishermen sue for the benefit of a contract with their ship owner, which cannot be carried out, because of the alleged negligence of a third party, the respondents, who collided with the vessel belonging to the owner who hired the fishermen?

In short, do the fishermen have any cause of action for what may be called the negligent interference with their contract right?

(Whereupon the objection was argued by



counsel for the respective parties, which argument was reported by the court reporter but not transcribed, at the request of counsel.)

The Court: All right. We will continue this discussion at 2:00 p.m.

(Whereupon at 12:20 o'clock p.m. a recess was taken until 2:00 o'clock p.m. of the same day.)

Thursday, December 8, 1949, 2:00 P.M.

(Further argument on objection by respective counsel, after which the Court stated the matter would be taken under submission, and directed that the trial proceed and testimony be taken, subject to the court's eventual ruling.

The Court: All right, will you proceed?

Mr. Shallenberger: Mr. Korgan.

### GEORGE KORGAN

one of the intervening libelants, called as a witness on behalf of the intervening libelants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: George Korgan.

### Direct Examination

By Mr. Shallenberger:

Mr. Korgan, you are going to have to make me hear over here, so you talk sufficiently loud and

(Testimony of George Korgan.)

sufficiently slow so that I can understand you, and then the Judge will be sure to understand you also.

The Witness: Yes, sir.

Q. (By Mr. Shallenberger): Mr. Korgan, you are the George Korgan who is one of the intervening libelants in this case? A. Yes.

Q. Speak up so I can hear you. A. Yes.

Q. Are you one of the co-owners of the vessel Bear? A. Yes, sir. [3\*]

Q. Is your co-intervening libelant Sam Bilas the other owner of the Bear? A. Yes, sir.

Q. And you are equal owners? A. Yes.

Q. Calling your attention, Mr. Korgan, to the 30th day of November, 1948, were you and Sam Bilas at that time equal owners of the Bear?

A. Yes, sir.

Q. And there were no others who participated in ownership with you? A. No, sir.

Q. You were the sole owners. Mr. Korgan, on that date of November 30, 1948, did you have a collision with another vessel? A. Yes, sir.

Q. That vessel you later identified as the Marsha Ann? A. The Marsha Ann, yes.

Q. Do you know approximately what time that collision took place?

A. I would say that was around about half-past eleven.

Q. In the morning?

A. In the morning, yes.

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\* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of George Korgan.)

Q. Where were you at the time the collision took place, Mr. Korgan? [4]

A. I was in the bunk. I was sleeping.

Q. And the collision woke you up, did it?

A. Yes. Yes, sir.

Q. At the time of the collision, Mr. Korgan, about where was your vessel proceeding?

A. We proceed to San Pedro.

Q. At the time and place of the collision how far was your vessel from San Pedro?

A. Oh, I don't know exactly, maybe a few miles. I don't know exactly, you know. I was in the bed and when I got up I don't know where we are exactly.

Q. Then, Mr. Korgan, where had you come from on this particular morning?

A. From Oceanside.

Q. By Oceanside do you mean the town towards San Diego?

A. You see, I don't know exactly. You know, we call it that. It was night, you know. All the fishermen call that Oceanside, you know, where we catch fish.

Q. But it was from a point in the ocean near the town of Oceanside?

A. Yes. More this way to the Pedro.

Q. What time, if you know, did you leave Oceanside? A. Around between 5:00 or 5:30.

Q. That was in the morning? [5]

A. In the morning.

(Testimony of George Korgan.)

Q. Of November 30th? A. Yes, sir.

Q. And at the time that you left Oceanside did you have any cargo aboard?

A. We got fish on board.

Q. All right. What kind of fish were they?

A. Sardines.

Q. And how much was there?

A. Well, there was around, we figure, 20, 21 ton.

Q. After the time you left Oceanside did you proceed direct towards San Pedro or did you stop anywhere?

A. We proceed direct to San Pedro.

Q. What is the size of your vessel, Mr. Korgan?

A. Sixty-five foot over-all.

Q. Sixty-five foot. And what is the tonnage of your vessel, that is, in cargo-carrying capacity?

A. In the cargo, around 40 ton.

Q. And that is in the hatch or above the hatch?

A. In the hatch.

Q. I beg pardon? A. In the hatch.

Q. In the hatch. Do you carry deck loads or not?

A. Yes. If we have fish, more fish than you can carry, on the deck load, too, sure. [6]

Q. How much can you carry on deck?

A. Oh, around, I figure, seven or eight ton.

Q. Mr. Korgan, when the collision occurred you woke up, you have testified. What did you do when you woke up?

A. When I heard somebody hit us I just jumped from the bunks, put my pants and my shoes and

(Testimony of George Korgan.)

went up and found the Marsha Ann right on the midship with his bow. Just I grab at his bow. I look around, somebody hollered out, two or three fellows hollered. They called me Groucho, nickname, Groucho. Then I thought somebody maybe was working on the hatch——

Q. No, no, Mr. Korgan. That last may go out as to what he thought, himself. Mr. Korgan, you just state what you saw or heard or what you did, not what you thought.      A. Oh.

Q. You have testified that you got your pants on and you came up on deck?      A. Yes.

Q. And you saw the bow of the Marsha Ann?

A. On the Marsha Ann.

Q. Just about midships?      A. Yes, sir.

Q. To your ship?      A. Yes, sir.

The Court: Which side? [7]

The Witness: Off the starboard side.

The Court: That is the right?

The Witness: The right side.

Q. (By Mr. Shallenberger): When you observed the bow of the Marsha Ann, Mr. Korgan, with relation to your ship was there or was there not any space between the bow of the Marsha Ann and the side of your ship?

A. No space at all. They was in the same hole. His bow was in the same hole in the guard.

Q. You say that his bow was in a hole in the guard. What do you mean by "hole"?



(Testimony of George Korgan.)

A. Just he was like half-moon. When he hit it bent in like half-moon.

Q. Before you observed the bow of the Marsha Ann had there been any half-moon hole in your guard rail?

A. Before, no. When he hit. He made it when he hit us.

Q. Now, you speak of a hole in your guard rail. Will you describe what the guard rail is? Tell the Court what the guard rail is.

A. The guard is about five inches, anyhow, thick, that iron bar around, and outside the iron bar we have about half-inch thick of iron all the way around the boat. You see, when he hit on that, just bent it inside, the wood and iron. [8]

The Court: Now, the guard rail is not a rail that stands up above?

The Witness: No, no.

The Court: It is a sort of band?

The Witness: A band.

The Court: Around the ship. All right, I think I understand it. It is generally about level with the deck, isn't it?

The Witness: Yes.

Mr. Shallenberger: Just a moment, your Honor. I think possibly I can show this.

Mr. Fall: If the Court please, I just noticed that Mr. Ancich came in and was sitting down here, and I just told him to leave the courtroom. He is now out.

The Court: I understand that this witness is

(Testimony of George Korgan.)

being produced on behalf of libelants and intervening libelants.

Mr. Shallenberger: No—well, yes. Yes, he is being produced on behalf of libelants, of the two sets of intervening libelants, also, your Honor.

Would you stipulate, Mr. Callaway, that his testimony both on direct and cross-examination may apply equally to all cases where it is applicable?

Mr. Callaway: So stipulated.

Mr. Shallenberger: To save time.

The Court: Didn't you gentlemen agree to draft a stipulation [9] of the things you agreed to at the pre-trial hearing?

Mr. Shallenberger: If the Court please, we all met out in the hall this morning and someone had the happy thought, is there a stipulation? Do you have one? We all opened our mouths and looked at each other and said, "Are you the one that is supposed to draw it?" Do I need to go further?

The Court: All right, let us forget it.

Mr. Callaway: Let us decide now who is going to draw it.

The Court: Now you raise that question we will give you the opportunity.

Mr. Callaway: I always open my big mouth at the wrong time. All right, we will draw it.

Q. (By Mr. Shallenberger): Mr. Korgan, I show you this picture. Put your glasses on and take a look at it.

Mr. Callaway: I will tell you, wouldn't it be easier——

(Testimony of George Korgan.)

Mr. Shallenberger: Better identify it first.

Mr. Callaway: Yes, as you go along.

Mr. Shallenberger: We will identify it first, your Honor.

The Clerk: That will be Libelants' Exhibit 1.

Mr. Shallenberger: Well, Libelants' and Intervening Libelants'.

The Clerk: If I use the term "Libelants," doesn't it apply to all libelants. [10]

Mr. Shallenberger: Certainly.

Mr. Callaway: Certainly.

The Clerk: It will save a lot of writing on it.

The Court: Is there any dispute about these pictures?

Mr. Callaway: As far as I know, your Honor, there is not.

The Court: Let us just put them in evidence and then ask any questions you want to afterwards.

Mr. Callaway: All right.

Mr. Shallenberger: Let us put them all in evidence, then. And, if the Court please, I will state for the record and for the Court's and counsel's understanding, we will have the surveyor under whose direction, supervision and control these pictures were taken. We will have him as a witness before the case is over.

The Court: How many of them are there?

The Clerk: Twelve, your Honor. Libelants' Exhibits 1 to 12, inclusive, admitted into evidence.

Q. (By Mr. Shallenberger): Now, Mr. Korgan, I ask you to take a look at Libelants' Exhibit No. 1.

(Testimony of George Korgan.)

You examine it and then I will ask you some questions.

(Witness examining Libelants' Exhibit 1.)

Q. Mr. Korgan, I will ask you a question. Looking at this picture in this fastion as though you were looking down——

A. Yes. [11]

Q. Can you identify this section which appears to have been crushed in some manner there? Can you tell me what that is?

A. This is deck. This is from the top.

Q. Right.

A. This is deck, this is bow, this is right side, starboard side, right here, ain't it?

Q. That is right. A. Yes.

Q. Can you identify this section here where it appears to have been crushed by something?

A. The Marsha Ann, he hit us right here, on this side here.

The Court: Does that show a part of the Bear?

The Witness: Yes.

Q. (By Mr. Shallenberger): All right. Is that the guard rail that you were talking about?

A. Guard rail, yes.

Q. And this was the half-moon that you were talking about? A. Yes.

Mr. Shallenberger: Indicating, if the Court please, the cross portion shown where it is obviously crushed in by something. I might state for the Court and counsel's convenience—I am not trying to testify—that that picture [12] is taken looking

(Testimony of George Korgan.)

down upon the deck from the top, showing a portion of the deck on the left, the rail and guard rail of the starboard side of the Bear.

Mr. Callaway: It obviously is that.

Q. (By Mr. Shallenberger): Now, Mr. Korgan, when you got up from the bunk and you reached the deck——

A. It was right here.

Q. The bow of the Marsha Ann was?

A. Was right in this hole here on that boat.

Q. Right into the guard rail? A. Yes.

Q. Where it is shown to be crushed in?

A. Yes, right here.

Q. And was there any space between the Marsha Ann and the place where you have indicated the bow was touching?

A. No, no space at all.

Q. Then at that time, Mr. Korgan, did you notice any movement of either vessel? A. No.

Q. In other words, was either one of the vessels moving at the time when you got up on deck?

A. No, because I come after five minutes when I got up.

Mr. Lopardo: What was that last answer, your Honor?

The Court: Read it, Mr. Reporter. [13]

(Answer read by the reporter.)

Q. (By Mr. Shallenberger): Now, then, Mr. Korgan, after you got on deck was anything said by you to anyone aboard the Marsha Ann or by anyone aboard the Marsha Ann to you?



(Testimony of George Korgan.)

A. When I come up to deck?

Q. Well, just answer me yes or no.

A. Yes.

Q. All right. Now, then, what was said?

A. They called me by nick-name "Groucho." They holler from the Marsha Ann, "Look out, Groucho. Look out, Groucho." Four or five times. Then I got scared. I don't know what they doing. I jump up the ladder, up to the pilot house, you see.

Q. All right. Was there anything else said between you and the Marsha Ann or the Marsha Ann and you at that time? Did they say anything more to you or did you say anything more to them?

A. No, just I heard them holler that what I say.

Q. At a later time, before you left the scene of the collision, was there any conversation between you and any member of the Marsha Ann?

A. No.

Q. Was there anything said by you or by any member of the Marsha Ann? A. No. [14]

Q. At the time of the collision, when you came up on deck and before your vessel was taken away from the scene of the collision, did you observe what had occurred to your vessel by reason of the collision? A. I couldn't understand you.

Q. All right. Did you look at your vessel and see what had happened to it? A. Yes.

Q. Will you tell what you could see at that time?

A. I see where the water coming in from both

(Testimony of George Korgan.)

sides. I see right away that the boat was opened up altogether.

The Court: Saw what?

The Witness: Opened up altogether.

Mr. Shallenberger: Opened up.

A. The water was come from both sides in.

Q. By "opened up" what do you mean, Mr. Korgan?

A. That is when he hit he spread the planks, you know, and this planking out, you know.

Q. In other words, it opened the seams between the planks, is that what you mean, Mr. Korgan?

A. Opened the seams altogether, yes.

Q. All right. Water was coming in?

A. Coming in, yes.

Q. On both sides of the vessel?

A. Both sides. [15]

Q. What else, if anything, did you see at that time? A. Nothing what I know.

Q. Nothing else at that time? A. No.

Q. Was the vessel taken away from the scene of the collision? Do you understand that?

A. No.

Q. All right. Did they take the vessel away?

A. Yes.

Q. Your vessel? A. Yes.

Q. How long after you got on deck did they take the vessel away?

A. Oh, about 15 minutes after?

Q. And who took it away?

A. Marsha Ann.

(Testimony of George Korgan.)

Q. Marsha Ann? A. Yes.

Q. And where did they take your vessel?

A. To the Van Camp elevator, unloading fish.

Q. The Van Camp cannery in Fish Harbor?

A. The Van Camp cannery, yes, on Fish Harbor.

Q. That is at San Pedro? A. San Pedro.

Q. And what was done at the Van Camp dock in San [16] Pedro?

A. Then we pulled for some pumps. I don't know what company bring the two pumps. They were working them both. Our pumps both working steady. We tried to unload the fish. We unload some. We lose about—I don't know, pretty hard to tell—six or seven ton, you know.

Q. Do you remember how much you unloaded?

A. Around 13 ton, I guess.

Q. You were unable to unload the balance of the fish?

A. No. So much water in the hold in the boat.

Q. Mr. Korgan, before this collision happened did your vessel leak? A. No.

Q. When was the last time before this collision happened that you had your vessel on the ways?

A. On the Tacoma, Washington.

Q. And when was that?

A. Around July sometime, in July.

Q. And that was in the shipyard?

The Court: 1948?

The Witness. 1948.

Q. (By Mr. Shallenberger): Was that in the shipyard? A. In the shipyard.

(Testimony of George Korgan.)

Q. What yard, do you remember?

A. Western Boat Builders, Martin [17] Fredericks.

Q. And at that time what was done to your vessel, if anything?

A. Nothing. He just gave me copper paint and caulk a little bit on the bow, a little caulking.

Q. In other words, you say copper paint, you mean he copper-painted the bottom?

A. Copper-painted the bottom, yes.

Q. And some caulking?

A. Yes. And another thing we had to put, we burnt the paint out and give it new paint. There were, you know, too much paint on that boat and I burn it out myself and my partner give it new paint.

Q. When was the last time before July, 1948, that the vessel was on the ways? A. In April.

Q. In April of 1948?

A. Yes. Before we go to Bering Sea, Alaska, two days before.

Q. Where was it taken out at that time?

A. I don't know exactly the day. We just doing copper-painting, that is all, and cleaned the bottom and copper-painting same like last time.

Q. What I asked, Mr. Korgan, was what place was it hauled, what place was it put on the ways?

A. On the same shipyard. [18]

Q. The same shipyard?

A. Yes, Western Boat Building.

Q. Western Boat Building Company at Tacoma?

A. Yes.

(Testimony of George Korgan.)

Q. I had thought you said you copper-painted the bottom? A. Yes.

Q. Did you do anything else at that time?

A. Nothing.

Q. When did you purchase the Bear, Mr. Korgan? When did you buy it?

A. In April, 1948.

Q. Then was it at the time you bought it that you put it on the ways the first time?

A. Yes.

Q. After you bought the Bear what did you do with it?

A. We went up to Bering Sea fishing for Government, fishing this spider crab they call them.

Q. How long did you fish in the Bering Sea?

A. Hundred days.

Q. I beg pardon? A. Hundred days.

Q. Then what did you do?

A. Then we come back down in the Puget Sound. We buying fish for 10 days. We was buying fish on the Puget [19] Sound for one outfit in Seattle.

Q. After that where did you go?

A. Then we come to San Pedro, fishing sardines.

Q. And you fished in San Pedro up to the time of this collision?

A. No, before. Before, when we come from Seattle.

Q. I don't believe you understand me. You say you came down to San Pedro and fished sardines?

A. Yes.

Q. After you came down to San Pedro, you stayed at San Pedro and fished sardines up until the



(Testimony of George Korgan.)

time that you had the collision with the Marsha Ann.

A. Yes.

Q. Is that right? A. Yes, that's right.

Q. From the time you bought the Bear to the time of the collision with the Marsha Ann had you had any collision with any other vessel?

A. No, sir.

Q. Had the Bear ever stranded or been in any accident? A. No, sir.

Q. From the Van Camp Seafood Company dock where the Bear was taken after this collision, where was the Bear taken?

A. We take her to the Harbor Boat Building.

Q. To the Harbor Boat Building Co.? [20]

A. Yes.

Q. And is that in Fish Harbor?

A. That is in Fish Harbor.

Q. Just a little ways down from the Van Camp dock? A. Yes.

Q. At the Harbor Boat Building Company what did they do? A. They put him on the ways.

Q. Was that the same day?

A. Same day, same night.

Q. And did you authorize the Harbor Boat Building Co. to do any work on the vessel?

A. No. The surveyor was there from insurance to bring the—I don't know. Michael John was on the boat. He say take him to east yard. I said, "All right, any yard to fix."

Q. And by surveyor do you mean marine surveyor or your insurance carrier?

(Testimony of George Korgan.)

A. Yes.

Q. And is it your testimony, Mr. Korgan, that you did not instruct the Harbor Boat Co. what to do? A. No.

Q. On your vessel, Mr. Korgan, how many did you have in your crew? A. 10. [21]

Q. Did that include yourself or is that besides yourself? A. That include myself.

Q. Included yourself. Did that include Mr. Bilas?

A. No, because he didn't work. He was sick at that time. He was in the hospital.

Q. He was in the hospital at the time of this collision occurred? A. Yes.

Q. Had he been fishing prior to that time during this sardine season?

A. He was fishing with us before.

Q. During this sardine season? A. Yes.

Q. So with Mr. Bilas and yourself there would be a crew of 11, is that right?

A. No, 10, because when Sam Bilas is off we take other man in his place. We always fish with the 10.

The Court: In other words, if Bilas went along there would be 10 altogether?

The Witness: 10 altogether.

The Court: Including you and Bilas. If Bilas was sick, you took another fisherman so there would be 10?

The Witness: Yes.

The Court: Always 10, okay. [22]

(Testimony of George Korgan.)

The Witness: Always 10.

Q. (By Mr. Shallenberger): How were these men paid, Mr. Korgan, when they worked for you on this vessel? A. They go by share.

Q. What share did those men get?

A. They get 32 per cent, the boat and net, and the rest of it we divided it on the shares, same share.

Q. All right. Now then, the boat——

The Court: Did you say “the boat and net”?

The Witness: Boat and net.

Q. (By Mr. Shallenberger): Got 32 per cent of the catch? A. Yes.

Q. Price of the catch? A. Yes.

Q. And the rest, the 68 per cent, was divided among the men? A. Among the 10 men, yes.

Q. Including yourself? A. Yes, sir.

Q. And Mr. Bilas when he was aboard?

A. Yes.

Q. Was that divided equally among the 10 men?

A. Equally.

Q. In other words, that 68 per cent was divided into 10 equal parts, is that right? [23]

A. Yes, that is true.

The Court: You get the same share?

The Witness: The same share.

The Court: As the other seamen?

The Witness: I get the same share.

Q. (By Mr. Shallenberger): How long had the men who were working for you at the time of this collision been working for you, Mr. Korgan?

(Testimony of George Korgan.)

A. You mean first night when we go out, we get in collision with the Marsha Ann, the first night?

Q. Do you mean the first night you went out that dark of the season. A. That dark.

Q. Had you been fishing before November 30th in this sardine season? A. Yes, sir.

The Court: I think we will take the recess at this time of a few minutes, about five minutes. Court will stand adjourned.

(Short recess.)

The Court: What did you agree on, counsel, for adjournment time?

Mr. Callaway: Well, they have got a couple of witnesses that they want to get rid of today, and we will go on with them until they finish with [24] those.

The Court: Very well.

Mr. Shallenberger: May I have the last question, Mr. Reporter?

The Court: When did the sardine season start? Is that agreed to?

Mr. Shallenberger: As a matter of law, your Honor, the sardine season at this time in California started October 1st and ended the last day of February of the succeeding year.

The Court: That would be February 28th.

Mr. Shallenberger: That is right.

The Court: That would be the legal limit?

Mr. Shallenberger: That is right.

The Court: Then I understand they only fish in the dark of the moon?

(Testimony of George Korgan.)

Mr. Shallenberger: That is correct.

The Court: Is that stipulated to?

Mr. Callaway: So stipulated.

The Court: All right.

Q. (By Mr. Shallenberger): Mr. Korgan, at the time that this collision occurred who were you fishing for?

A. We was fishing for Tomacich and Benn.

Q. And where are they located?

A. Benn is located in Burlington and Tomacich is San Pedro.

Q. And did you have any arrangement to fish for anyone [25] else?

A. We got arrangement with California Pack.

Q. You mean the California Sea Food?

A. California Sea Food.

Q. In Long Beach?

A. In Long Beach.

Q. California Sea Food Corporation?

A. That is right.

Q. What arrangements had you made to fish for them, Mr. Korgan?

A. They told us 20 ton, 20-ton limit.

Q. Did you have a definite time arranged that you were to fish for California Sea Food?

A. Yes. It was too late. They told us to go out. Like next day you come, you sign this paper, contract.

Q. Do you know what the terms of the contract were to be? Did you discuss with Cal Sea Food how long you were to fish for them?



(Testimony of George Korgan.)

A. All season.

The Court: When were you to start, the next day after the collision?

The Witness: The same day.

The Court: The same night?

The Witness: The same night, yes.

Q. (By Mr. Shallenberger): Where were you to deliver [26] the catch you had at the time of the collision? Where were you supposed to deliver the fish you had on board at the time of the collision?

A. To California Sea Food.

Q. These other two men you mention, you had been fishing for them before, is that it?

A. Before, yes.

Q. What price were you to get for the sardines?

A. First, you mean, when we were fishing before?

Q. No, when you were fishing for them.

A. I guess \$50.00. I am not sure. \$50.00.

Q. \$50.00 a ton? A. A ton.

Q. Before this 1948-1949 sardine season had you ever fished sardines? A. Yes, sir.

Q. And had you ever fished sardines in San Pedro?

A. I fished sardines in San Pedro for 12 years.

Q. Did you ever have your own vessel before you had the Bear?

A. I got eight, eight boats.

Q. You had eight boats?

A. Eight boats before.

The Court: Before you had this accident?

(Testimony of George Korgan.)

The Witness: Before I had the Bear. [27]

Q. (By Mr. Shallenberger): How long have you been in the fishing business as a commercial fisherman? A. From 1918.

Q. Mr. Korgan, had you fished before this night in this 1948-1949 sardine season? Had you gone fishing before November 30th? A. Yes.

Q. In this particular sardine season?

A. Yes, sir.

Q. And when was that?

A. Oh, that was—I can't tell you exactly day, but we was fishing three nights.

Q. There was a boat tie-up in October and part of November, was there not, Mr. Korgan?

A. Yes.

Q. And those three days you mention, was that in October before the boats were tied up?

A. Yes, sir.

The Court: What do you mean by a "boat tie-up," a strike?

Mr. Shallenberger: There was a strike, your Honor.

The Witness: Yes.

Q. (By Mr. Shallenberger): Did you catch fish on these three nights that you had been fishing in October? A. Yes. [28]

Q. How much did you catch?

A. Around 50 or 60 ton.

Q. Did you catch fish each night or did you catch that amount over the three-night period?

A. Every night.

(Testimony of George Korgan.)

Q. You caught fish every night?

A. Every night.

Q. The 50 to 60 tons, is that a total of what you caught or is that each night?

A. I guess it is a total, or each night. I don't know for sure, you know, because we get—I know money, how much we get. We get \$3,600 for our three nights.

Q. For the three nights? A. Yes.

Q. And that was for the total catch for the three nights? A. Yes, sir.

Q. Do you know how much a ton that \$3,600 represented?

A. That was \$67.50 per ton.

Q. In other words, if I understand your testimony correctly, Mr. Korgan, you were paid \$67.50 a ton for the three nights fishing in October?

A. Yes, sir.

Q. And that came to a total of \$3,600?

A. Yes. [29]

The Court: Pardon me, counsel.

Mr. Callaway: Do you want us to retire?

The Court: No. We will continue until we get the attorneys in.

Mr. Shallenberger: Do you want me to continue now, your Honor?

The Court: Yes.

Q. (By Mr. Shallenberger): In fishing for sardines you fish in the dark of the moon only?

A. Yes, sir.

(Testimony of George Korgan.)

Q. And how many days a week do you fish during the dark of the moon?

A. Oh, around 20 days.

Q. No. How many days in each week during the dark of the moon do you fish, like Monday, Tuesday, Wednesday, Thursday and Friday?

A. Yes.

Q. What days during the week do you fish when you are fishing?

A. Sunday night, Monday, Tuesday, Wednesday to Friday night.

Q. Do you go out Friday night?

A. There was that time.

Q. Saturday night is the only night, then, you do not go out? [30]

A. No. Sunday law.

Q. I beg pardon?

A. Sunday lay off, you know, with Sunday law.

The Court: Lay off.

Mr. Shallenberger: Law?

A. We stay home that night.

Q. In other words, you do not go out Saturday so that the men can be home Sunday, is that right?

A. That is right.

Q. Now, do you go out Sunday night?

A. Sunday night, yes.

Q. You go out? A. Yes.

(Interruption for other court proceedings.)

Q. (By Mr. Shallenberger): Mr. Korgan, who owns the fishing net that was being used aboard the Bear on the date of this collision?

A. I and my partner, Sam Bilas.

(Testimony of George Korgan.)

Q. And you were the sole owners of the net?

A. Yes, sir.

Q. How long, Mr. Korgan, were the members of the crew that you had aboard this vessel hired for?

A. I believe it was only two men to take, I and Nick Milosevich. They was all new fellows, you know. We hire all new. [31]

Q. Did you hire them? A. Yes, sir.

Q. How long did you hire them for?

A. We hire them for all season.

Q. By that you mean the sardine season?

A. Sardine season, yes, sir. I can't tell any other way.

Q. Mr. Korgan, when did you receive your vessel from the shipyard after this collision?

A. I believe that was in February.

Q. Do you remember what date in February?

A. No, I can't tell you what day.

Q. Well, was it approximately the 15th of February?

A. Something like that, 15th.

Q. Between November 30th, the day the collision happened, and the day you received your vessel back, were you employed at anything?

A. No, no place.

Q. You were not working anywhere?

A. No.

Q. Did you try to get work during that time?

A. I try all over but can't get no job no place.

Mr. Shallenberger: You may cross-examine, Mr. Callaway. [32]



(Testimony of George Korgan.)

Cross-Examination

By Mr. Callaway:

Q. How old was the Bear? What year was she built?      A. She was built 1917.

Q. What was her gross tonnage?

A. I can't tell you exactly what is its tonnage gross, I forget.

Q. All right. What time was it, Mr. Korgan, that you went to sleep?

A. It was about 9:30.

Q. 9:30 in the morning?

A. Around 9:30.

Q. And who did you leave at the wheel?

A. Just about that time.

Q. I say, who did you leave at the wheel?

A. Let's see. Nick Milosevich.

Q. He was at the wheel?      A. Yes.

Q. What was the condition of weather at the time you went to sleep?

A. When I was on the wheel it was nice and clear weather.

Q. Nice and clear. Did you have anybody stationed on the bow?

A. I don't know what you mean. [33]

Q. Did you have a man stationed on the bow of the boat?

A. There was three or four fellows at that pilot house.

Q. No, I didn't ask you that. My question is:

(Testimony of George Korgan.)

Did you designate someone to keep watch at the bow before you went to sleep?      A. No.

Q. At the time you went to sleep, I take it that you changed watch, so to speak?

A. Yes, sir.

Q. You were the one aboard who did designate the respective crewmen to their posts, were you not? You told the men where to work?

A. Yes.

Q. And designated the watch?

A. Yes, sir.

Q. How many sets did you make that night?

A. I can't tell you exactly how many sets we made. You know, that is a year ago, past year. I don't know how many.

Q. In other words, you do not remember, is that it?      A. I don't remember.

Q. Were you awakened by the collision?

A. When he hit. When he hit us, then I wake up. I jump right awake. [34]

Q. Well, you jumped up and put on your pants and shoes?      A. Yes.

Q. And rushed up on the deck?

A. On the deck.

Q. Where did you sleep, below?

A. Down below on the forecastle.

Q. When you got up there was your engine still running?      A. Engine still running.

Q. Your engine?      A. Yes.

Q. Was the engine of the Marsha Ann running?

A. I don't know. I can't tell you that.

(Testimony of George Korgan.)

Q. You think it took you five minutes from the time you woke up before you got on deck?

A. Yes, four or five minutes.

Q. At that time, if I understand it correctly, the bow of the Marsha Ann was still contacting your boat in this crushed portion that is shown in the picture?

A. Yes, sir.

Q. Had not drifted apart any?

A. No.

Q. Eventually the two boats separated. I say, eventually the two boats separated from that position, did they not? Do you know what I mean by separated? Come [35] apart?

A. Come apart, yes.

Q. Eventually they did, didn't they?

A. Yes.

Q. There wasn't anything holding the bow of the Marsha Ann and the Bear together?

A. No.

Q. By that I mean no broken parts?

A. No broken parts. Just like half moon.

Q. When the boys said, "Look out, Groucho"—what do they call you?

A. They call my nick-name "Groucho," yes.

Q. They said, "Look out. Look out, Groucho," you immediately went up to the pilot house?

A. I jump right away up to the pilot house, sure.

Q. Was Nick Milosevich still there?

A. Yes.

Q. What was he doing?

A. He was holding the wheel there, you know.

(Testimony of George Korgan.)

Q. Well, by that time?

A. He talked with Jack, I guess, at that time. When I jump up there he talk with Jack.

Q. And Jack said to him in words, substance or effect, "What the hell is the matter with you guys," didn't he?

A. No, I don't heard that at all. [36]

Q. Or words to that effect?

A. I don't heard that at all.

Q. What did you hear him say?

A. I never heard nothing what he had say to Jack Milosevich.

Q. Up to that time had any of your crewmen gotten on board the Marsha Ann? A. Yes.

Q. And the Marsha Ann was throwing lines to you already, were they not?

A. I don't know. I can't tell you about that.

Q. Well, Nick backed up right alongside parallel with the Marsha Ann, didn't he?

A. No, sir.

Q. Didn't the Marsha Ann actually practically lift you out of the water and tow you in?

A. He towed us in, yes.

Q. In other words, it had to take some of your weight out of the water in order to keep you from sinking, didn't it?

A. He kept alongside. He kept us alongside. He tow us in. Our engine working just the same, because there was no water in our engine, just a little bit.

Q. Didn't they have a block and tackle?

(Testimony of George Korgan.)

A. When we get alongside to unloading, yes, but not [37] before.

Q. You mean as you were being towed in you did not have a block and tackle over you?

A. No, sir. We were coming in, then they put block and tackle on.

Q. They had lines to both your stern and bow, did they not?      A. Yes, sir.

Q. Those lines were taut?      A. Yes, sir.

Q. How long was it then, Mr. Korgan, after you got on deck before you backed up?

A. We don't back up——

Q. Wait just a minute, now. And they made lines fast to keep you in a position to tow you in?

Mr. Shallenberger: Just a moment, your Honor. I object to that question as assuming a fact not in evidence. The witness has already stated that they did not back up. Read the question. It is compound.

Mr. Callaway: Well, I have a right to assume facts not in evidence, of course, on cross-examination.

The Court: The objection is overruled.

(Question read by the reporter.)

Mr. Callaway: I will withdraw that and reframe it to this extent: [38]

Q. You did back up parallel along the port side of the Marsha Ann, did you not?      A. No, sir.

Q. How did you get in position?

A. Marsha Ann just slide out of that hole, alongside, then he gave us line. They towed us in.



(Testimony of George Korgan.)

Q. In other words, it is your contention that the Marsha Ann changed its position, is that right?

A. No. I don't know how he slide. Maybe take him out and slide in. He come alongside us.

Q. When you got on deck and saw these two boats together in what direction was the Marsha Ann facing, what direction on the compass?

A. Right straight. When he hit us?

Q. No. You did not see that. I am just asking you about what direction the boat was when you got on deck, on the compass.

A. We going?

Q. Not what direction you were going. The direction the Marsha Ann was heading

A. I don't know what you mean.

Q. The bow of the Marsha Ann was at what point on the compass when you got on deck?

A. We going northwest.

Q. No, Mr. Korgan. My question is a simple one. Not [39] where you were going.

The Court: It may be he is trying to figure, but there is no showing he saw the compass on the Marsha Ann. He is trying to figure out which way the Bear was going and from that which way the Marsha Ann was going.

The Witness: We go to northwest and hit us right straight on the middle of the ship.

The Court: Just wait. Did you see the compass on the Marsha Ann?

The Witness: No.

The Court: Did you see the compass on the Bear?

(Testimony of George Korgan.)

The Witness: Not at that time. You know, everybody got excited, you know. Who going to look on the compass?

Q. (By Mr. Callaway): I mean do you know generally in what direction the Marsha Ann was facing at the time you came on deck, generally, generally?

A. Facing most San Clemente Island—I mean Catalina Island.

Q. All right. What direction was the Bear facing or headed? A. To the Pedro light.

Q. How long after you got on deck was it before these two ships separated from the position that you say they were in when you first saw them?

A. How do you mean? [40]

Q. How long was it after you got on deck before the Marsha Ann and the Bear separated, came apart? A. Oh, about 10 minutes.

Q. Was that effected by the use of their power or did they just drift apart?

A. Just drifted.

Q. And when the Marsha Ann came alongside or the Bear came alongside, whichever it was, was that by drifting or by the use of the power?

A. I swore that he come by drifting alongside.

Q. In other words, they just drifted alongside of you? A. Yes.

Q. And threw lines to you?

A. Yes. I heard Jack say to Milosevich, "Give me line, I tow you in."

Q. Prior to the time that you had this collision

(Testimony of George Korgan.)

had you been awakened by any signals being given by the Bear?       A. No.

Q. How long, Mr. Korgan, had it been since the strike was over before November 30th, 1948—about? I am not trying to pin you down to exact time, but just approximately.

A. How long were——

Q. How long was the strike over before you went out on November 30th?

A. I don't know. [41]

Q. Approximately?

A. I don't know. I can't tell you. There was a few days, anyhow, I know.

Q. It had been over for more than a month, hadn't it?

A. Yes, I guess that would be about a month.

Q. So at that time you were fishing for the California Sea Food Corporation?

A. At that time. First night when we go out, when we get collision, we go for California Sea Food.

Q. The 1948-1949 sardine season was the worst that you have ever known since you have been fishing in San Pedro, wasn't it, from the standpoint of what anybody caught?

A. It was poor season, yes, I know.

Q. As a matter of fact you know, do you not, that shortly after November 30, 1948, the California Sea Food cannery closed down and did not take any fish from anybody?

(Testimony of George Korgan.)

A. No, that time when we made contract with them.

Q. Did you make it in writing?

A. We make it in writing. We don't sign it. He told us to go out tonight, then sign it tomorrow when you come with the fish.

Q. Have you got a copy of that?

A. I guess they have it on the cannery.

Q. That only provided that you were to fish for them from trip to trip, did it not? [42]

A. No. For a whole season.

Q. At what price did they agree to take your catch?

A. I can't tell you. About \$50.00. I know he didn't pay sixty-seven and one-half like before. I guess \$50.00, \$50.00 a ton.

Q. It is not the question of value. The price of sardines was uniform, was it not, throughout the harbor and fixed by what the seamen demanded through the union?

A. The unions?

Q. Yes. A. Sure.

Q. In other words, if the seamen who were participating in the catch could not get so much per ton for sardines, the union would not let them fish, is that right?

A. That is right.

Q. So what was the uniform price at that time in the harbor for sardines?

A. Do you mean when we go out that night?

Q. I mean what was everybody paying under the edict, we will put it, laid down by the unions?

(Testimony of George Korgan.)

A. I guess \$50.00, \$45.00 or \$50.00, somewhere around that.

Q. How long was it after November 30, 1948, that the California Sea Food Company closed down their cannery?

A. I don't know. I can't tell you about [43] that.

Q. Were you at the shipyard at the time this boat was being repaired?

A. Yes, sir, every day.

Q. Every day. They were not working on it every day, either, were they?

A. No. Sometimes it was rainy, they don't work.

The Court: Mr. Witness, speak up so the reporter can hear you.

Q. (By Mr. Callaway): Did you see the boat?

A. I saw the boat.

Q. Every day? A. Every day.

Mr. Callaway: If it is agreeable with the court, I will withdraw this witness from the stand so they can put these other short witnesses on.

Mr. Shallenberger: I was just going to suggest that.

Mr. Callaway: May I offer these four pictures for identification, with the statement to counsel that I will have the man here under whose direction they were made?

Mr. Shallenberger: Satisfactory.

The Court: We will put them in evidence.

The Clerk: Respondents' Exhibits A, B, C, and D in evidence.



(Testimony of George Korgan.)

(The documents referred to were marked Respondents' Exhibits A, B, C, and D and received in evidence.) [44]

Q. (By Mr. Callaway): Is this the appearance of the hull of the bow with the side plank decking off and new ribs put in at the time she was being repaired, that is the new ribs showing the lighter pieces of wood? Is that the way she looked?

A. Yes.

Mr. Callaway: That is all. I will withdraw this witness, your Honor, in view of the situation.

The Court: You may step down. You are temporarily excused.

Mr. Shallenberger: Call Mr. Hoopes.

### W. H. HOOPES

an intervening libelant, called on behalf of intervening libelants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please? Your name, please?

The Witness: W. H. Hoopes, H-o-o-p-e-s.

### Direct Examination

By Mr. Shallenberger:

Q. Mr. Hoopes, on November 30, 1948, were you a member of the crew of the vessel Bear?

A. Yes.

Q. Speak up so we can hear you.

A. Yes. [45]

(Testimony of W. H. Hoopes.)

Q. And then everybody can hear you. No, you can sit down. Just speak up. What was your position as a crew member aboard the Bear?

A. Engineer.

Q. And do you recall a collision on the 30th of November between the vessel Bear and the Marsha Ann?

A. Yes.

Q. And where were you at the time of that collision, Mr. Hoopes?

A. I was standing on deck within about eight or ten feet of where the vessel hit us.

Q. On which side of the vessel?

A. Starboard.

Q. And where on the starboard side of the vessel were you standing? Will you identify it?

A. I was just forward amidships or halfway of the vessel under the green sidelights.

Q. How long had you been in that position prior to the time of the collision?

A. Oh, 10, 12 or 15 minutes. No set time. I couldn't set an exact time. I happened to be on deck at the time watching through the fog for approaching vessels and one thing and another.

Q. In other words, you were acting as a lookout, were you, at that position?

A. Not exactly as a lookout, except to the [46] interests of myself and the boat and the crew. While I was on deck I was looking out the same as anybody else would.

Q. What was the condition of the weather at that time, Mr. Hoopes?

(Testimony of W. H. Hoopes.)

A. The sea was very calm and it was very foggy, a visibility about 50 or 60 feet.

Q. Was there any wind?           A. No wind.

Q. Was there any swell?

A. A slight swell.

Q. Where was the Marsha Ann with relation to the vessel Bear when you first saw the Marsha Ann?

A. I saw the Bear just forward and abaft of the beam at about 50 or 60 feet.

Mr. Shallenberger: May I have that answer again?           A. Looking forward.

(Answer read by the reporter.)

Q. Do you mean you saw the Bear or the Marsha Ann?

A. The Marsha Ann. Did I say the "Bear"?

The Court: You did, sir.

The Witness: I beg your pardon.

Q. (By Mr. Shallenberger): Did you see how far away the Marsha Ann was at that time?

A. 50 or 60 feet.

Q. In what direction was she proceeding with relation [47] to the Bear?

A. Well, I was standing at just under the green light and she was headed right at me as near as I could figure, coming through the fog.

Q. And was the Bear in motion at the time?

A. Very little. She was under way, I imagine, a mile, a mile and a quarter, and maybe a mile and a half, but it was a very, very slow speed.

(Testimony of W. H. Hoopes.)

Q. How was she proceeding? Can you describe it?

A. Well, just kicking it in and out of gear enough to have a slight momentum. We were working our way in to the foghorn.

Q. Did you hear any signal from the Marsha Ann?

A. Well, to distinctly say whether it was the Marsha Ann or not, there were so many whistles at the time it was hard to distinguish whether the Marsha Ann was blowing or not.

Q. Was the Bear sounding any whistles?

A. Yes, the Bear was continuously sounding whistles.

Q. You say "continuously." By that what do you mean?

A. The answering whistles on the way through fog and blowing their own whistles.

Q. How often would you say the Bear was blowing its whistle?

A. Well, that being that I was not on the top side, I [48] didn't spend particularly notice of how often, but I do know that it was quite often. I should say several times a minute to three or four times a minute.

Q. Did you notice how long a blast the Bear was blowing when it did blow its whistle?

A. Well, I would say they were a regular signal for boats in a fog.

Mr. Callaway: I move to strike that out as being a conclusion of the witness.

(Testimony of W. H. Hoopes.)

The Court: It may go out.

Q. (By Mr. Shallenberger): Just tell me, if you recall, how long you believe the blasts to be that the Bear would blow?

A. Well, I wouldn't say a prolonged blast, but it was a distinct fog signal.

Q. Would you be able to estimate in matter of seconds?

A. Time? Well, I would say about one or two seconds.

Q. Did you notice whether the Marsha Ann was moving or not at the time you first saw her?

A. Yes, I did. It was moving.

Q. All right. Will you state whether she was or not?

A. She was moving.

Q. And did you form any opinion of how fast she was moving?

A. Yes. The opinion I formed was as to her speed from [49] the time that I first saw her at 50 to 60 feet we moved approximately eight to 10 feet.

Q. Well, no, Mr. Hoopes. Will you just tell me, if you formed any opinion as to her speed, what was her speed? Then if you want to explain your answer, you may.

A. Oh, I see, yes. Well, I judge her speed coming through the water. She had a wake under her on her bow, and as to the exact speed it could have been anywhere from two to six mile an hour, but I couldn't say. I couldn't state an exact speed there outside of in relationship to where it hit us.



(Testimony of W. H. Hoopes.)

Q. You state that you saw a wake at her bow. What do you mean by that, Mr. Hoopes?

A. Well, that is a water disturbance of a boat going through the water.

Q. What kind of a water disturbance?

A. Well, an object going through the water creates a wave. In other words, on each side of the bow, and we call it a wake.

The Court: You are talking to an old seaman. I used to have a job as spare fireman in the merchant marine, west coast, and I worked on the Dorothy Alexander for one whole summer as spare fireman.

Mr. Shallenberger: Very well, your Honor. I apologize for having the witness explain what a wake is. [50]

The Court: Very well.

Q. (By Mr. Shallenberger): Could you determine what color the wake was, if any?

A. Well, I would say there was a foam on it, enough wake to be a slight foam on it, because it was white.

Q. It was white? A. Yes, sir.

Q. And that was when you saw her 50 to 60 feet away, I believe you said?

A. As she was approaching.

Q. And at that time she was, as far as you could determine, I believe your testimony is, bearing on the green light of the Bear? A. Yes.

Q. Now, where did she strike or come into contact with the Bear with relation to the green light?

(Testimony of W. H. Hoopes.)

A. About eight or 10 feet further aft on the starboard rail.

Q. Did she change her course any from the time you first saw her?

A. I don't think there was a fraction of change in course nor speed, except—no, I don't think there was any change in speed or course all the way.

Q. Was there any change in the speed or course of the Bear? [51]

A. Yes. The skipper had throwed it into reverse.

Q. When did he throw it into reverse with relation to the time you first saw the Marsha Ann?

A. I imagine it was within a few seconds afterwards, because we all started hollering that there was a boat coming out of the fog, and who was doing the hollering I couldn't say, but he throwed her into reverse.

Q. Was there any other change on the Bear?

A. No, I don't know of any other change.

Q. After throwing the Bear into reverse did you notice whether the Bear responded or not to the reverse?

A. Oh, yes. She started to slow down right—in fact, she started taking right away, but sluggishly. We had a load on board.

Q. Prior to the time that the Marsha Ann struck the Bear did she actually start going backwards?

A. No.

Q. In other words, she started losing headway?

A. She was losing headway.

(Testimony of W. H. Hoopes.)

Q. But had not changed her direction?

A. She was not going in reverse. I mean the boat was not going in reverse, the engine was.

Q. Now, then, when the Marsha Ann struck the Bear what part of the Marsha Ann struck the Bear?

A. The bow stem of the Marsha Ann. [52]

Q. And will you describe how it struck and what occurred right immediately after?

A. The bow of the Marsha Ann struck the guard rail of the Bear approximately amidships, just slightly aft of amidships, and mashed the guard into the hull of the boat.

Q. Then what occurred, if anything?

A. Well, right away, the boat was still—I mean the boat was still stuck in our bow and she still shoved us sideways until the momentum of the both boats died completely, and then the boat merely swung around to our starboard, to his port rail, and we still hung onto the two boats.

Q. You said after she hit she was shoving you sideways. You mean the Bear was traveling sideways after the impact?

A. The impact of this heavier boat, she was still going sideways after she was hit.

Q. How long did that motion continue, if you have any idea?

A. That I couldn't say too strong on just how far it happened, because as soon as I got my wits about me I ran down to the pump to see whether we were taking water or not.

(Testimony of W. H. Hoopes.)

Q. Did you notice whether the Marsha Ann had any lights on her?

A. I don't recall of any lights on the Marsha Ann.

Q. You mean you do not recall whether she did or not?           A. Did or not, no. [53]

Q. Did what?

A. I don't recall whether she had a light on or not.

Q. Did the Bear have any lights on?

A. The Bear's lights, all of her running lights, were on.

Q. When you say all of the running lights what do you mean?

A. I mean the sidelights, the masthead, and the mast light.

Q. After the collision did you overhear any conversation or any remarks from anyone aboard the Marsha Ann?

A. Well, most of the talk was in Slav. One English expression I heard right off the boat was that who I took to be the skipper. He was on the bridge of the Marsha Ann. I don't know him. As I remember, he called that he saw us as he was approaching in his radar.

Q. You don't know who the man was that said that?

A. No, I couldn't tell you. There was one or two men on the bridge and the one that was doing the talking I took to be the captain.

Q. Did the Bear have radar, Mr. Hoopes?

(Testimony of W. H. Hoopes.)

A. No.

Q. Mr. Hoopes, were you employed aboard the vessel Bear on a share system?

A. On a share system. [54]

Q. What share did you get?

A. Well, the crew is split up into equal shares after your boat share is taken out. And, if I remember right, it was 33, or just about one share, 33 or 34 per cent for the boat and net, and then it is shared up equally amongst the fishermen.

Q. And you received an equal share with the rest of the crew? A. Yes.

Q. Drawing your attention to the date of November 30th, to approximately the date of February the 15th, 1949—November 30 of 1948—were you employed during that period of time?

A. Yes, part of the time.

Q. And where were you employed?

A. At the boat works where the Bear was on the ways.

Q. And what did you receive as compensation during that time?

A. Well, without going back and looking it up, I would make a rough guess at around \$500.

Q. But it was the Harbor Boat Building Company, was it? A. Yes.

Q. Did you work anywhere else during that time? A. No.

Q. Do you recall when you started to work at the [55] Harbor Boat?

A. The accident occurred on the 20th?



(Testimony of W. H. Hoopes.)

Q. 30th of November.

A. It was about three or four days later.

Q. During that interval of time had you attempted to seek any other employment?

A. Oh, yes. I was down, figuring on trying to get on another boat for the rest of the dark, and then I had been told that I might be able to get on at the yard. So I went down and tried to get on at the yard.

The Court: How long did you work at the Harbor Boat Yard?

The Witness: I worked there right until our boat was back in the water, which was in—I can't tell you the date that we got out of the yard—approximately a little less than three months.

Mr. Callaway: We cannot hear the witness, your Honor.

Mr. Shallenberger: I cannot, either.

(Answer read by the reporter.)

Mr. Shallenberger: You may cross-examine, Mr. Callaway.

### Cross-Examination

By Mr. Callaway:

Q. Was anybody on the bow of the boat at the time that you first saw the Marsha Ann, anybody on the bow of the boat at the time you first saw the Marsha Ann? [56]

A. Of which boat?

Q. Of the Bear.

(Testimony of W. H. Hoopes.)

A. That I wouldn't say. I wasn't on the bow. The men that I know were on topside, on the top of the pilot house.

Q. Who was at the wheel?

A. The captain, Capt. Milosevich.

Q. Sir?

A. Not the captain. That is our fishing boss, Milosevich.

Q. Was anybody in the pilot house with him?

A. They were on top of the pilot house. We have what we call topside controls and we are right out in the open on top of the pilot house with a lot of goldbricks around you. You have a vision all around you from that station.

Q. Who was it that was up there?

A. Well, let's see. Milosevich.

Q. Who? A. Milosevich.

Q. He was the guy at the wheel, wasn't he?

A. At the wheel, and there was the cook was on topside, Ancich.

Q. What is his name? A. Ancich.

Q. Ancich? [57]

A. And I think Tony Bogdanovich was on topside.

Q. Anybody else?

A. And Martin—I can't pronounce his last name. You will have to help me out there. I can't pronounce it myself.

Mr. Shallenberger: Miskulian?

A. Miskulian, yes. And I think there was one

(Testimony of W. H. Hoopes.)

more man up there. I think Johnny Kaiza was on topside.

Q. (By Mr. Callaway): Mr. Korgan stated that you had been fishing off Oceanside, is that about right? A. Yes, on the Oceanside area.

Q. Right in there, yes. A. Yes.

Q. And that he left there from 5:00 to 5:30, is that right? A. Approximately.

Q. When you came towards San Pedro where was it that you ran into the first fog, if you know?

A. The first fog we ran into was somewhere off of the Newport area.

Q. Some place off Newport you ran into the first fog?

A. But there was more of a light fog. The closer we got to the breakwater, the foggier it got.

Q. In other words, it started out being a light fog and the closer you got to the breakwater, the more dense it became? [58]

A. That is right.

Q. Prior to the time that you reached Newport about what speed was the Bear traveling?

A. I would say between eight and eight and one-half.

Q. Miles or knots?

A. Knots. We don't use miles in the ocean.

Q. You referred to it in your direct testimony as miles. A. Miles is nautical.

Q. You mean nautical miles? A. Yes.

Q. All right. And when you reached Newport,

(Testimony of W. H. Hoopes.)

where you first ran into this fog, was your speed reduced any?

A. Not right away, because we still had a clear visibility. I can remember of fair visibility until we were off of Seal Beach breakwater, out from Seal Beach. So we didn't—

Q. You had fair visibility until you got to the Seal Beach breakwater?

A. Yes. From there it started dropping down very heavy.

Q. Was there a reduction in speed made when you were off the Seal Beach breakwater?

A. Well, being that I wasn't on topside at the time, I wouldn't say when the exact slow-down was. Because from there on in—

Q. You could tell? [59]

A. —they started cutting their speed down.

Q. You could tell from the motor. You were down in the engine room, weren't you?

A. Yes. But still, when I am down there, I am not on topside even half of the time to know what they slow down for.

Q. I understand. Anyway, how long had they been traveling at this pace of what you say was one to one and one-half nautical miles per hour?

A. Until somewhere between Newport and Seal Beach.

Q. When did they start traveling at that slow speed?      A. I wouldn't say.

Q. Approximately?      A. I don't know.

(Testimony of W. H. Hoopes.)

Q. How long had you been on deck before this accident happened?

A. Before the actual accident?

Q. Yes. A. 12 or 15 minutes.

Q. Well, had they been traveling during that 12 or 15 minutes at——

A. No. They were traveling at a very slow speed. At that time the visibility——

Q. Wait a minute, now. Let me finish my question. You don't know what I am going to ask you yet. Were they [60] traveling during that 10 or 15 minutes at from one to one and a half nautical miles per hour? A. Yes.

Q. In what direction on the compass, approximately, was the Bear headed when you first sighted the Marsha Ann? A. I wouldn't know.

Q. What was the gross weight of the Bear?

A. I don't know.

Q. Did you go back to work on her after these repairs were effected?

A. I also made a trip to Alaska and back in her, and I still don't know what her gross weight is.

Q. How long had you been working as a crew member on the Bear before the incident in question?

A. A couple of months—no, that was not a couple of months. It was about—let's see—nearly all of November.

Q. You had only fished three nights in November, hadn't you, before this happened?

A. It was right after they finished that three nights that I went on the boat. The other engineer



(Testimony of W. H. Hoopes.)

went north. He was a Seattle or a Tacoma boy. And that is when I went on the boat.

Q. Then this was the first trip you had made?

A. Yes.

Q. During that particular sardine season?

A. Yes. [61]

Q. My question is: Did you work on the Bear afterwards? A. Yes.

Q. Were you on it when she sunk?

A. No. I was off about—oh, I should judge right around a month before she went down.

Q. What did you say to the helmsman at the time you saw the Marsha Ann bearing down about 50 to 60 feet away, headed right towards the position at which you were standing on the starboard side?

A. It happened so quick, what statement I made I wouldn't be able to say. I do remember of hollering to one of the men that was working on the net table on the rear. I hollered at Pete, Peter Svorinich, because he was on the offside and I was afraid he would get knocked in the water. And I hollered to Pete to look out, to hang on, there was a boat going to him him, as far as I remember. I don't know if I said anything to him at all or not, but I did holler at Pete Svorinich.

Q. How much time elapsed, Mr. Hoopes, between the time that you first sighted the Marsha Ann and the actual impact?

A. It couldn't have been very long, seconds.

Q. I didn't ask you that.

(Testimony of W. H. Hoopes.)

A. I know. You are asking me——

Q. I asked you how long it was.

A. I have no way of figuring that out. [62]

Q. Well, give me an approximation of the amount of time that elapsed.

Mr. Shallenberger: I object to the question as argumentative. He said he had no way of telling.

A. That is something I can't answer.

Q. (By Mr. Callaway): Have you no recollection as to the amount of time that elapsed from the time that you saw the Marsha Ann, first sighted her, and the actual impact?

A. Yes, sir. I have in my mind, but to give you a time, a set time that it took to make it, I can't do it.

Q. Let us have it understood that I am not expecting you to give me an answer to project on a stop-watch proposition. I am only asking you for your best estimate as to the amount of time.

Mr. Shallenberger: I would object to the question, your Honor. I think that this is argumentative. He has answered every way possible that he could not estimate it in measurements of time.

The Court: Well, we will let him answer once more. Objection overruled.

Mr. Callaway: Read the question back to him.

(Question read by the reporter.)

A. Well, I would say, just to make it rough and give you an idea, we will say about 10 seconds.

Q. About 10 seconds. Well, you knew, did you

(Testimony of W. H. Hoopes.)

not, [63] Mr. Hoopes, that if the Bear would increase its speed, the accident could be avoided, did you not?

A. No, I don't think so. At the speed we were going, I don't think we could have got out of the way in time. If we had of, it would be worse, it would have hit us in the steering instead of amidships.

The Court: Of course, that is argumentative, because he was not at the wheel.

Mr. Callaway: Yes, I agree with you, your Honor.

Mr. Shallenberger: I am willing that the answer remain.

The Court: It would not help me decide the case.

Mr. Callaway: Sir?

The Court: It would not help me decide it one way or the other.

Q. (By Mr. Callaway): How long did these two boats remain in contact with each other after the impact?

A. Well, in my own way I can draw a picture of it, I think, if you let me explain my own way of it.

Q. I am not asking you about the position. I am just asking you about the length of time that they remained in contact with each other.

A. You are getting down now to where it is pretty hard for me to make that time estimate.

Q. Do you have no recollection of the amount of

(Testimony of W. H. Hoopes.)

time in which they remained in contact before they drifted apart? [64]

A. They never did drift apart.

Q. How long, then, did they stay in contact with each other?

A. Well, the Bear at the time had a forward momentum.

Q. No, no. My question is very simple. How long did they stay this way before they eventually were parted or did part?

Mr. Shallenberger: If you know, Mr. Hoopes.

A. That is what I am trying to explain to you, if you will let me explain in my own way.

Mr. Callaway: All I am seeking from you is the length of time.

A. Because at the time of the impact the boat was gradually moving back until it was portside to the Bear, and there was no set time it was just like that. It never did stay like that.

Q. How long before the two boats parted?

The Court: It has been asked and answered enough.

Q. (By Mr. Callaway: One time they were in this position and eventually they got into that position (illustrating), is that right? A. Yes.

Q. At that time I take it the bow of the Bear was ahead of the bow of the Marsha Ann?

A. Right. [65]

Q. Was that corrected and were they brought together before the Bear was towed in?

A. Yes. The Marsha Ann come alongside then.



(Testimony of W. H. Hoopes.)

Q. How was that effected, by power or drifting?

A. No, that was by pulling the two boats together, that is, man-handling it together.

Q. You mean by manpower?

A. Yes, manpower.

Q. Lines thrown from one to the other and the boats pulled together in that fashion?

A. That is right, and pushing the boats together.

Q. After the collision, immediately after, was the Bear's motor or engines turned on?

A. The engines on the Bear never did stop.

Q. How about on the Marsha Ann?

A. They work together from the time they left the place of the accident.

Q. No. But I mean right after the collision, immediately after, was the engine on the Marsha Ann running?      A. I don't know.

Q. How were the two boats made fast before?

A. The Marsha Ann—we put a sling on the Bear and we lashed to their boom to take care of the weight.

Q. In other words, the Marsha Ann was practically, at least, bearing some of the weight of the Bear? [66]      A. On the way in.

Q. On the way in.

A. When they were tied together.

Q. With a tackle and sling and line at the bow and the stern?      A. Yes.

Q. Did you go aboard the Marsha Ann?

A. No.

Q. How long did you remain there at the scene



(Testimony of W. H. Hoopes.)

of the collision before the two boats were made fast to each other?

A. It couldn't have been very long, because we were taking water so fast we had to get in.

Q. Only a matter of a few minutes, wasn't it?

A. That is right.

Q. Right now?

A. Just a matter of a few minutes.

Q. Did you examine the stem of the bow? Did you examine the bow stem of the Marsha Ann after the collision? A. No.

Q. To pay any attention to it? A. No.

Q. Did you hear Capt. Borcich yell following the collision, say in words, substance or effect to the helmsman of your boat, "What the hell is the matter with you? Are you crazy?" or words to that effect? [67]

A. Not to my recollection, no.

Q. Using these two little boat models, isn't it true, Mr. Hoopes, that at the time of the collision the Marsha Ann—first, I will ask you this: The Marsha Ann is the larger and much larger of the two boats, is it not?

A. By two or three times.

Q. Two or three times as big. All right. Now, isn't it true that at the time of the collision the Marsha Ann was headed in a somewhat southeasterly direction, but in still water, and that the Bear came along and hit her somewhat in this fashion that I now hold the boats? A. No.

(Testimony of W. H. Hoopes.)

Mr. Callaway: Can we put this in evidence?

Mr. Shallenberger: Yes.

The Court: Respondents' next in order.

The Clerk: Respondents' Exhibit E in evidence.

(The document referred to was marked Respondents' Exhibit E and received in evidence.)

Q. (By Mr. Callaway): I will ask you this question: Did the Bear veer her course either to port or starboard from the time you first sighted the Marsha Ann up to the point of collision?

A. No.

Q. I will show you a photograph of the starboard side of the Bear, showing the point of impact. Do you see it? [68]

A. (Witness examining photograph.)

Q. Now, how do you account for the fact that the "V" or the indentation that is made is shorter on the stern side and longer on the bow side if the boats were not in the position that I have just indicated?

A. Can I put that in my own words?

The Court: Yes, sir.

A. I can do it easier. That is exactly the way, their positions that I was describing. I was standing. The green light is just above this ladder on the top side——

Mr. Shallenberger: Keep your voice up.

A. ——of the bridge. The Bear was thusly. As to north, south, east or west, when you are in a fog,

(Testimony of W. H. Hoopes.)

as far as I am concerned if I am not watching the compass, I don't know which direction we were going, outside of that we were headed in the direction of approximately west to north, in between west and north, on account of this direction the swells were coming in. So we will say the Bear is here and when I first saw the Marsha Ann from this point, he was approximately 60 feet in this direction and I was standing approximately here. And while he kept right on coming, and from the time I first saw him until we got over here, we traveled about eight or 10 feet, and that is where our momentum, a mile to a mile and a half, would account for this much slide on the rail. [69]

Q. (By Mr. Callaway): All right. Let me ask you this question: In other words, the Bear traveled 50 to 60 feet while you traveled from eight to 10, is that right?

A. You got the answers. And then the crash.

Q. I see, and you are right? A. Yes.

Q. Let me ask you this question: How much did you get per hour when you worked at the Harbor Boat Works?

A. \$1.42, I think, or somewhere near that.

Q. And you only worked on the Bear—

A. No, no. I worked in the yard.

Q. Oh, I see. In other words, you were not confining your work to the Bear? A. No.

Mr. Callaway: That is all.

(Testimony of W. H. Hoopes.)

Redirect Examination

By Mr. Shallenberger:

Q. Mr. Hoopes, when you first saw the Marsha Ann at the time of the collision did you observe anyone on her bow?

A. Not on the bow. On the topside, on her top-side bridge.

Q. Where the controls are? A. Yes.

Q. But nobody on the bow? A. No. [70]

Q. From the time you first saw her until the time of the impact did you observe anybody on the bow? A. No.

Q. Mr. Hoopes, did the Bear sink or burn?

Mr. Callaway: I assume that that would call for hearsay. He said he was not there.

Mr. Shallenberger: I don't know. You asked him if he was aboard when it sunk and he said, "No."

Mr. Callaway: If he was not there, he would not know.

Mr. Shallenberger: I mean you inquired into it and I was just asking.

The Court: What has this got to do with the case?

Mr. Callaway: Nothing.

The Court: Was this some later occasion the Bear was lost?

Mr. Callaway: Yes. It has nothing to do.

Mr. Shallenberger: It is relatively unimportant.

(Testimony of W. H. Hoopes.)

I don't know why Mr. Callaway went into it, but I was just going to ask. That is all.

The Court: Step down, Mr. Hoopes.

Mr. Shallenberger: This next witness will only take about five minutes. I mean with cross-examination, even.

Mr. Fall: This man is going to leave tonight for Hueneme.

Mr. Callaway: What will he testify to? Maybe I will [71] stipulate to it.

The Court: Now we are making progress.

Mr. Fall: It will only take five minutes.

The Court: Let us hear what he will testify to. What is his name?

Mr. Shallenberger: William Decker.

Mr. Fall: If he were called, he would testify that he was below, sleeping, at the time of the collision; that he came up on topside within two or three minutes.

Mr. Callaway: Have you got a statement from him?

Mr. Fall: I have a statement, yes.

Mr. Callaway: Let me see it. Maybe we can just put that in.

Mr. Fall: There are some things here. The fish boat Marsha Ann had her stem hard against our starboard side just amidship, and we were taking some water. We had about 15 to 20 tons of sardines aboard and were on our way to the cannery at Terminal Island to unload. When we came on deck we found we were in a dense fog. Our run-



(Testimony of W. H. Hoopes.)

ning lights were on and running lights on the Marsha Ann were not burning. There was, of course, some discussion of the accident and we definitely heard someone from the Marsha Ann say they, those on the Marsha Ann, had seen us on their radar set before the accident. We don't know the——

The Court: Well, you had better get him up here. [72]

Mr. Shallenberger: That is all?

Mr. Fall: Well, with the exception that he will testify, too, that the Bear was pushed sideways for a period of minutes before the Marsha Ann came up along parallel to the Bear.

Mr. Callaway: Oh, I will stipulate he would so testify if he was called.

Mr. Fall: That he will testify further that with reference to light——

Mr. Callaway: You had better be satisfied. I might withdraw my stipulation.

Mr. Fall: Well, this must be in. That he attempted to get other employment during the period of time that the Bear was laid up for repairs, but he was not able to get employment. The reason was that other men had been employed for the season and there was no opening.

Mr. Callaway: Oh, I will stipulate he would so testify if he was called. So stipulated, that if he was called he would so testify.

Mr. Fall: So stipulated.

(Testimony of W. H. Hoopes.)

The Court: At least he was not an eye witness.

Mr. Callaway: No.

The Court: All right, so stipulated. Can we take an adjournment at this time, then?

Mr. Fall: I think so, your Honor. [73]

The Court: Do you want to start at 9:30 or 10:00 tomorrow, gentlemen?

Mr. Callaway: If your Honor please, if there were any hope of finishing this thing tomorrow, I would say 9:30, but it is just hopeless.

The Court: Very well, 10:00 o'clock tomorrow morning.

(Whereupon, a recess was taken until 10:00 o'clock a.m. of the following day, Friday, December 9, 1949.) [74]

Friday, December 9, 1949, 10:00 A.M.

(Case called for further trial.)

Mr. Shallenberger: Do you want Mr. Korgan to resume the stand?

Mr. Callaway: I will call him back later.

The Court: Mr. Reporter, can you read that stipulation as to what this witness will testify to that we hurriedly went over last night?

(Record read by the reporter as requested.)

Mr. Callaway: Your Honor, I have a model of a fish boat here a little different from others, so we get some idea of the pilot house and the way it is built.

The net, as you see, hangs off the back and when

(Testimony of W. H. Hoopes.)

they get on a school of fish, they put a man off in this skiff and let a net out and circle around this until they get back in the dory, and then pick up the net and purse it like a purse, and then the fish are immediately brailed out of the net. The net and the fish are not actually brought aboard the boat. They have a big brail or dipper they drop, and they dip down in the net and dig down in the fish and drop it over there.

I thought it might be interesting to you to give you some idea of how these boats are constructed.

The Court: It seems to me the Bear was about 60 to 70 feet in length? [76]

Mr. Callaway: That is right.

Mr. Shallenberger: 65.

The Court: How long was the Marsha Ann?

Mr. Callaway: Almost a hundred, 97.

The Court: But the general construction of both boats——

Mr. Callaway: Was generally the same.

The Court: ——was generally the same. I mean there might be a difference in the cabin arrangement or one thing and another. Both of them had an open topside where the——

Mr. Callaway: No.

The Court: I thought there was testimony that there were people—skip it. As far as the Bear was concerned, however, the pilot who steered the boat was out in the open?

Mr. Shallenberger: That is the testimony.

(Testimony of W. H. Hoopes.)

Mr. Callaway: That is the testimony, I understand.

Mr. Shallenberger: In other words, the testimony is that he was out here on this flying bridge where it shows a wheel on this vessel.

The Court: All right.

Mr. Callaway: In other words, if I understand it correctly, I think you can either be out here on this flying bridge or you can be inside. Is that right? You can steer it from the outside on the flying bridge as well as inside.

The Court: You are talking about the Bear or the Marsha Ann? [77]

Mr. Shallenberger: No, no, not about the Bear.

Mr. Callaway: In other words, as I understand it, the Bear does not have this little pilot house up here, but this has the open flying bridge.

Mr. Shallenberger: The flying bridge, that is right. There is variation in those respects as to the different vessels. Your later vessels have more superstructure in that connection.

The Court: All right, proceed. Do you want to call Mr. Korgan again?

Mr. Shallenberger: I think Mr. Callaway wants to recall him later.

Mr. Callaway: I may not have any questions for him.

Mr. Shallenberger: I will call my next witness. Mr. Milosevich.

## NICK MILOSEVICH

one of intervening libelants, called as a witness on behalf of intervening libelants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Nick Milosevich.

## Direct Examination

By Mr. Shallenberger:

Mr. Milosevich, keep your voice up when I ask a question so all of the counsel here can hear, and in that way, also [78] the reporter and the judge will be able to hear everything you say and clearly.

Q. Mr. Milosevich, what is your occupation?

A. Fisherman.

Q. How long have you been engaged as a fisherman?      A. From 1910.

Q. Is that as a commercial fisherman?

A. Yes, commercial fisherman. Yes, sir.

Q. And where have you been engaged as a commercial fisherman?

A. I was engaged around Seattle, Puget Sound, Alaska, California, all over to the Mexico.

Q. Have you during the course of your occupation as a commercial fisherman, been a boat owner also?      A. Yes.

Q. And have you acted as a master?

A. Yes.

Q. Of a fishing vessel?      A. Yes.

Q. Now, then, Mr. Milosevich, on calling your



(Testimony of Nick Milosevich.)

attention to November 30, 1948, were you engaged as a commercial fisherman aboard the vessel Bear?

A. Yes.

Q. Do you recall the circumstances of a collision between the vessel Bear and the vessel Marsha Ann? [79]

A. Yes.

Q. On that date?

A. Yes.

Q. Calling your attention, Mr. Milosevich, to the time prior to the collision, before the collision, where was the Bear when it started out that morning?

A. We was in the vicinity around the Oceanside, some place around there close.

Q. What time did you start on your way towards San Pedro?

A. Oh, it is around about 5:30.

Q. And at that time who was at the wheel?

A. Mr. George Korgan.

Q. And he is the owner of the vessel?

A. Yes.

Q. Do you know what the condition of the weather was at the time you left Oceanside?

A. It was clear weather and calm.

Q. Did you later take the wheel yourself, Mr. Milosevich?

A. Yes, I traded George.

Q. About what time?

A. About, I should judge, around about 9:00-9:30.

Q. And at that time do you recall what compass heading the vessel was on? [80]

A. George have 295 degree on the compass and I was proceeding same course.

Q. You were proceeding the same course as what

(Testimony of Nick Milosevich.)

the vessel was on when the wheel was turned over to you, is that right?      A. Yes.

Q. Did you change that course any?

A. No.

Q. Between the time you took the wheel and the time of the collision?

A. No, we didn't. We was keeping the same course.

Q. Were you on the wheel from 9:30 until the time of the collision?      A. Yes, I was.

Q. And did you have the wheel at the time of the collision?      A. Yes.

Q. Did you stop anywhere from the time you took the wheel to the time of the collision?

A. I slowed down. Shall I explain it my way?

Q. Well, no. I just asked you if you stopped anywhere.      A. I didn't stop on the way.

Q. All right. In other words, you pursued your course?      A. Yes, for lighthouse.

Q. Directly to where the collision occurred, is that [81] right?      A. Yes.

Q. Will you describe the weather at the time you took over the wheel at 9:30?

A. Yes, I can.

Q. All right, will you do so?

A. When I take wheel 9:30 was nice and clear, and when we came outside Seaside start the beginning of the fog, little, you know. She wasn't very thick at that time. And farther we was going to lighthouse, she was coming thicker. Then we slowed down half speed at that time, at first.

(Testimony of Nick Milosevich.)

Q. Where was it that you first sighted the fog?

A. Off by Seaside, outside Seaside they call that little town right there, about eight or nine miles to lighthouse of entrance of San Pedro.

Q. Do you mean Seal Beach, Mr. Milosevich?

A. Seal Beach, yes. That is about eight miles to San Pedro lighthouse.

The Court: I think there is a place down there called Seaside, too.

Mr. Shallenberger: I had never heard that one, your Honor. That is why I asked.

The Witness: That Seaside, that is the hotel, that is hotel.

Q. (By Mr. Shallenberger): At that time you encountered [82] fog. Was that fog heavy or light or what was the condition of it?

A. When we hit the fog she was pretty light. You can see a mile.

Q. The visibility was a mile?

A. A mile, the visibility.

Q. As you progressed up the coast did the fog get lighter or denser?

A. She was getting thicker.

Q. And did your visibility decrease as the fog got thicker?

A. Visibility, we couldn't see more than a hundred yards at that time, again. You know, she was coming thicker and thicker and thicker all the time, you know.

Q. All right. Now, then, I believe you stated that you reduced speed. About when did you reduce

(Testimony of Nick Milosevich.)

speed with relation to when you first saw the fog?

A. I reduced the speed around about, I should judge, around about 10:30, pretty close to 11:00 o'clock. I reduced to half speed.

Q. You reduced it to half speed?

A. Yes, half speed.

Q. And about what is half speed?

A. Oh, around about, I should judge about four mile an hour, four and one-half most. [83]

Q. By four and one-half miles an hour do you mean nautical miles?      A. Nautical.

Q. Or shoreside?      A. Nautical miles.

Q. Did you again reduce speed prior to the collision?      A. Yes.

Q. And when was that?

A. When we heard some boats was start to blow whistle. They was maybe three or four hundred yards from us, some left of us, some right of us, some front of us. So we come down to speed around about two mile an hour.

Q. Did you have any men posted on the bridge with you?

A. Yes. I had, I think, three men with me on top all the time when we hit the fog.

Q. Who were those men and where were they?

A. Mr. Miskulian and Mr. Bogdanovich, and I know Cook was up and—I don't know his name.

The Court: Is the cook's name Ancich?

The Witness: Ancich was cook. He came up at same time. Kaiza—I don't know if that is his right name, Kaiza. I know three men and Cook came up.



(Testimony of Nick Milosevich.)

Q. (By Mr. Shallenberger): All right. Did you give those men any duties to perform that were up there with you? A. Yes. Yes, because—

Q. State what duties you gave to what crew member.

A. I gave it to crew. I said—two of us always stay three hours on the wheel, you know, two at a time. And sometime when the fog was up, one fellow, he didn't want to sleep because on account of fog, so I told them all to be on the lookout. So I think five of us, five or six of us up all the time, including engineer, you know. And we was watching, and Mr. Miskulian was on the wheel. He was blowing whistle, supposed to be done three or four times a minute.

Q. That was Mr. Miskulian?

A. Miskulian, yes.

Q. Where was he blowing the whistle? Where was he blowing the whistle? Where was he on the boat? A. He was alongside of me.

Q. Which side of you? A. Left.

Q. What kind of a whistle was he blowing?

A. He was blowing air whistle what we use on the boat.

Q. And how is that air whistle run?

A. You mean how she blows?

Q. No. What makes it run? A. Air.

Q. All right. And how is that air generated?

A. We got the little pump down in engine room to fill up the tank. [85]

Q. In other words, the air horn is not operated



(Testimony of Nick Milosevich.)

with the hand to supply the air, it comes from the engine, is that it?

A. It comes from the engine, yes, sir. We got a little engine to do that.

Q. And who else was on the bridge with you?

A. Mr. Bogdanovich, he was up——

Q. And where was he?

A. He was just on the right side of me. He was leaning on a big box what we keep supply ropes, all these things. He was leaning on the big box watching outside. That was the starboard side of the boat.

Q. Had you posted any men down on the deck of the boat?

A. One, and they was working around the nets. That was—I don't know what his name is. Just a minute, I can't recall his name now. Svorinich. I know it is Svorinich. I don't know his first name. Svorinich.

Q. Peter Svorinich?

A. He was working around the net at the stern.

Q. And did you have any other men posted on the deck, Mr. Milosevich?

A. Kaiza was up with me, too. He was just on the—just behind Mr. Bogdanovich.

Q. No. But on the deck were there any others?

A. Don't have to be on deck, because there is a pilot [86] house right in front by the bow.

Mr. Callaway: I move to strike that out as not responsive.

The Court: It may be stricken.

(Testimony of Nick Milosevich.)

Mr. Shallenberger: Just listen to the question.

Q. Did you have any other men on the deck of the Bear? A. No.

Q. Do you know where the engineer was, Mr. Milosevich?

A. Engineer was going down in engine and come out. He happened to be on the deck at that time when both hit, because he saw the boat first, I think. Marsha Ann was coming to us.

Q. Now, when did you first see the Marsha Ann, Mr. Milosevich? A. I can't understand that.

Q. All right. Did you see the Marsha Ann before the collision?

A. I see her about 40 or 50 feet from us.

Q. Before the collision?

A. Before the collision, yes.

Q. And at that time what did you do?

A. We was idling. We didn't go ahead at all. Maybe about a mile an hour on that speed, but I think was stop and go and stop, you know, account of lots of boats around.

Q. All right. Now, you were going stop and go?

A. Yes. [87]

Q. About a mile an hour?

A. About a mile an hour. That is all I can figure.

Q. When you saw the Marsha Ann what did you do, if anything? A. What did I do?

Q. Yes, when you first saw it.

A. I can't do nothing. I tried to back up the boat to clear, because she was going toward us, to hit us

(Testimony of Nick Milosevich.)

on the quarter of the bow right there, on the green light, if he was staying still. We was proceeding a mile and she hit us maybe about 10 feet below that toward the stern.

Q. All right, you tried to back up. What did you do to try to back up?

A. To clear her, you know, so——

Q. No. What did you do to try and back the vessel up? A. I reverse the engine.

Q. All right. Did the reverse take hold of the Bear?

A. Not right away, Mr. Shallenberger. She can't take in a second. It takes her four or five seconds until she feels it.

Q. Well, did you notice that it was taking hold at all before the Marsha Ann struck?

A. Just a little bit. She didn't go backwards, though, yet. [88]

Q. Did you still have forward headway?

A. She had forward speed yet a little bit.

Q. Now, did you do anything else besides reverse the engine?

A. As soon as she hit us, she hit actually, I put on "idle" again.

Q. In other words, you took it out of gear when she hit you, is that it? A. Yes.

Q. All right. Now then, before she hit you, however, did you do anything else other than reverse the engine?

A. No, I didn't do anything.

Q. Did you change the direction of the Bear in

(Testimony of Nick Milosevich.)

any way?           A. No, we didn't.

Q. After the Marsha Ann hit you what did you do?

A. I told boys to look down in the hatch if the boat making any water. They all jump to work around the pumps, and we had big pump on the engine room, too. They was working and she started to make water, but we didn't see water alongside engine yet, you know, because fish down in the hold. We couldn't notice it right away. Four or five minutes after I saw water come through the fish, you know, through the fish, and she started to fill up on the back end, and they was working with the pumps and I told Marsha Ann [89] right away to give us something to hold us up so we won't sink.

Q. All right. And did they?

A. Yes, they did.

Q. What did they give you? What did they give you?

A. They give us block, double block, to hold her so she wouldn't sink down, and they put couple of lines on the side, too.

Q. Did you notice where the Marsha Ann struck the Bear, what part of the Bear?

A. Right in amidship between rigging.

Q. Did you notice what part of the Marsha Ann struck the Bear?           A. By the bow.

Q. And did you notice whether the Marsha Ann stayed bow on to the Bear for any length of time?

A. Yes. She stayed there for about two or three minutes, maybe more, longer than that.

(Testimony of Nick Milosevich.)

Q. And did the Marsha Ann and the Bear eventually separate so that her bow was not against the Bear?

A. I think two or three minutes she was against her. She was pushing us a little bit, because she little bit heavier boat than we are, you know. She was pushing us sidewise a little bit, and on that same time, you know, we got a little bit of speed and she come kind of alongside of us, [90] you know, because I don't know if she back up or not. If she couldn't do that, I can't tell you that.

Q. Before the collision, Mr. Milosevich, did you hear any signals from the Marsha Ann?

A. No, I didn't.

Q. Did you hear any signals at all?

A. I heard lots of signals from other boats, maybe from her, very far, you know, about four or five, three or four hundred yards from us was lots of boats there. Was maybe 30 to 40 boats around us on the distance, around about a mile, you know, a mile area. But we didn't see them all because it was foggy.

Q. You heard no signals that were as near you, as you recall, as you saw the Marsha Ann?

A. No.

Mr. Callaway: Don't lead him, Mr. Shallenberger. I object to that as leading and the answer should be stricken.

The Court: Objection sustained.

Q. (By Mr. Shallenberger): Just before the collision was the Bear giving any signals?



(Testimony of Nick Milosevich.)

A. Yes.

Q. What signals?

A. We was air whistle. We was blowing four or five times a minute and each signal was anyhow between four and five seconds long. [91]

Q. After the collision, Mr. Milosevich, did you have any conversation with anybody aboard the Marsha Ann?

A. Yes, I had conversation with the captain.

Q. And by captain who do you mean?

A. Jack Borcich.

Q. All right. Where did that conversation take place?

A. When he was alongside of us.

Q. Well, where were you?

A. I was on top pilot house. He was on top pilot house.

Q. On top of his pilot house?

A. Yes.

Q. All right. Will you state what that conversation was, what he said and what you said, if anything.

A. I told him, I says, "Jack, what's the matter with you, you go so much speed on this fog?" He don't answer me on that. He told me this, you see, "Nick, I saw you over 300 yard distance." Then I told him, I says, "I thought you stop when you saw me with the radar." He had radar on, you know. I says, "Why don't you stop?" because we was just drifting, going slowly, about a mile, a mile and a half an hour. That is all we was going.

Q. All right. What did he say to that, if anything?

(Testimony of Nick Milosevich.)

A. He said that something was wrong with clutch, it seems to me, and he couldn't reverse the boat. That is what I get out of him. [92]

Q. Was there any other conversation between you and Mr. Borcich or you and anyone else that night?

A. Was not no conversation any more. I just told Jack to pull us in to the cannery so we can unload the fish, because we wasn't very far from there, maybe two, two and one-half mile off the light. He did it. That is all right, he did that.

The Court: Which is Borcich here?

Mr. Callaway: This is Mr. Borcich here. (Indicating a man at the counsel table)

Q. (By Mr. Shallenberger): Did you, Mr. Milosevich, form any opinion as to what speed the Marsha Ann was traveling when you first saw it?

A. I should judge when I saw it around about 40 to 50 feet from us, I should judge she was going about around four mile an hour, about four mile.

Q. And did you notice whether her speed changed any from that time to the time that she struck the Bear?      A. I didn't notice that.

Q. Well, what do you mean, did you notice whether it did or whether it did not?

A. No. I mean this way: I don't think she change any speed because, you know, if he put engine "idle" at same time when he was here——

Mr. Callaway: Just a moment. I move to strike all that [93] out as not responsive after the words "I don't think she changed speed."

(Testimony of Nick Milosevich.)

Mr. Shallenberger: It may go out as far as I am concerned.

The Court: It may go out.

Q. (By Mr. Shallenberger): Did you notice whether the Marsha Ann changed her course in any way?

A. No, what I know. No, she was going direct for us.

Q. When you got to the cannery dock what was done?

A. Mr. Borcich, he bring us to the cannery to unload that fish and we were tied up right there.

Q. Did you unload the fish?

A. Unload the fish and Mr. Radus, he bring three or four pumps, electric pumps, to hold boat up, you know, not to fill up with water so we can unload the fish. And then we left from the cannery to shipyard, you know, and Mr. Borcich told me this way: He says, "Nick, what you have to back up for me," he says, "my clutch don't work right." That is what he told me. He says, "I back up for you."

The Court: Were the boats still tied together?

The Witness: Yes, sir.

Q. (By Mr. Shallenberger): At the speed at which you were traveling, Mr. Milosevich, just before the Marsha Ann struck the Bear what distance would it take you to stop the Bear? [94]

A. On that speed I was traveling, you mean?

Q. Yes.

A. I can stop Bear in a length of the boat, easy, on that speed I was traveling.

(Testimony of Nick Milosevich.)

Q. Who hired you as a crew member of the Bear, Mr. Milosevich?      A. Who hire me?

Q. Yes.      A. Mr. George Korgan.

Q. When did he hire you?

A. He hire me a year and a half ago.

Q. And you were a crew member of the Bear from that time on, were you?

A. I was a member of the Bear, yes, of the crew, you know. I was fish boss all the time.

Q. How long were you hired for, Mr. Milosevich?

A. I was hired that day when they brought the boat from Mr. Brescovich in Tacoma to go up to Alaska that they working for the Government fishing spider crabs up there. That is what they mean exploring things, you know, look where the fish is. So we was working up there until—oh about 110 days for Korgan to July, to July 10th. We came back around July 5th or 10th.

Q. Mr. Milosevich, during the time between November 30, 1948, when the collision occurred, and the middle of [95] February, 1949, were you working?

A. What did you say? I didn't get it. I didn't understand that.

Mr. Shallenberger: Will you read it, please, Mr. Reporter?

(Question read by the reporter)

A. Between the—no, I wasn't working then.

Q. Did you attempt to get work during that time?      A. Yes.

(Testimony of Nick Milosevich.)

Q. And you were not successful? A. No.

Q. Mr. Milosevich, at the time that you first saw the Marsha Ann, in your opinion is there anything that you could have done to avoid the collision?

Mr. Callaway: I object to that as calling for a conclusion of the witness and invading the province of the court.

Mr. Shallenberger: He is an expert, Your Honor.

The Court: The latter part of the objection, I think, is good. I think that that is a relevant question the court will probably have to decide. The objection is sustained in the form of the question is now framed. Incidentally, that type of question is largely in the way in which the question is framed. I had that come up in my first patent case.

Mr. Shallenberger: I will change it, Your Honor.

Q. Mr. Milosevich, between the time you saw the Marsha [96] Ann and the time of the collision did you do everything that you believed possible to avoid the collision?

Mr. Callaway: I object to that as being irrelevant and immaterial as to the state of the mind of the witness, and is not determinative of any issue in this case.

The Court: I think the objection should be sustained. I think you could inquire of a witness as to what a skipper of a boat would do when he saw another boat approaching, and ask him what the different alternatives were and which one he did. He



(Testimony of Nick Milosevich.)

is an expert in that field. But when you try to ask him: Did you do everything that could be done, that is what the court has to decide. He is the fellow at the wheel.

Mr. Shallenberger: That is true. I thought the question proper because I was asking him if, in his opinion. After all, that is just one man's opinion.

The Court: Supposing that he thought that he did everything that he could have done, but actually it was determined he did not. What difference would what he thought make? There is no intent involved here. It is a question of whether there was negligence.

Q. (By Mr. Shallenberger): Mr. Milosevich, in your opinion, under the circumstances where a vessel is seen 40 to 50 feet to your starboard, bearing down upon you almost amidships at a speed of four miles an hour, and the vessel is proceeding at a speed of a mile or a mile and a half an [97] hour, what in your opinion could the helmsman of the vessel proceeding at a mile to a mile and a half an hour do to avoid a collision?

Mr. Callaway: I object to that——

A. He can't do it.

The Court: Just a minute, Mr. Witness.

Mr. Callaway: I object to that on the grounds that it calls for the conclusion of the witness, No. 1. No. 2, no proper foundation has been laid. And No. 3 is; it is irrelevant, incompetent and immaterial what his opinion is.

(Testimony of Nick Milosevich.)

The vice of the question is this: Suppose the witness says "nothing." It would have no probative value. In other words, if he wants to ask him if he is familiar with what is required under those circumstances of a skipper, that is another thing. But his opinion has no probative value.

The Court: Well, the objection is overruled, unless you seriously question that this man cannot give opinion testimony in such a thing. I take it he makes his living on the sea. He has been a fisherman since 1910, he has been a master.

Mr. Callaway: I don't think he testified he was a master. He said he had owned boats.

Mr. Shallenberger: No, he testified he was a master, also.

The Court: Had been a master and had owned boats. [98] It is, of course, clearly opinion evidence. But if you want to raise the question as to whether or not he can give an opinion, it would seem to me that on boats the same rule would apply as an automobile, that a person who is shown to have any familiarity in driving an automobile is allowed to give his opinion on matters concerning automobiles.

Mr. Callaway: Yes, your Honor. But I am not permitted to prove or disprove an automobile case by saying, in my opinion, it was safe to drive at 50 miles an hour as I was driving at the time. It is not up to me, because my opinion has no probative value. It is up to the trier of the facts to determine from all the circumstances whether or not that was

(Testimony of Nick Milosevich.)

a safe speed. But anyway, I am not going to press the proposition any more.

The Court: All right, objection overruled.

Mr. Shallenberger: Will you read the question to him, Mr. Reporter? He has probably forgotten it.

(Question read by the reporter.)

The Witness: Do you want me to answer that?

Mr. Shallenberger: Yes.

A. No, you can't do it, avoid the collision.

Q. You can't do what?

A. You can't get away from it. He have to hit you.

Q. Is there anything that the helmsman can do on a vessel traveling a mile to a mile and a half an hour in that [99] situation?

Mr. Callaway: I object to that as having been asked and answered.

The Court: Objection sustained.

Q. (By Mr. Shallenberger): Mr. Milosevich, at the speed that the Bear was traveling before the collision, if you had attempted to turn the Bear's course, would she have responded to her rudder?

A. No, she can't respond right away. It takes her about four minutes—at the rate of one mile, until she can lessen, you know, she won't lessen. It takes her four or five seconds to do that.

Q. You said just a moment ago, Mr. Milosevich, four or five minutes. You now say four or five seconds. Which is correct?

(Testimony of Nick Milosevich.)

A. You didn't ask me that question before, did you?

The Court: What did you mean, it takes four minutes, or four or five seconds?

The Witness: No, four or five seconds until she start to lessen on that slow speed.

The Court: And when she starts to lessen——

The Witness: You know, rudder.

The Court: When she starts to lessen, by that do you mean there will be some movement then of the boat?

The Witness: Yes, she start to move. It takes her four [100] or five seconds just to start it.

The Court: How many speeds ahead did this boat have?

The Witness: We can go to regular speed about eight and one-half.

The Court: Does the boat have a low and a high?

The Witness: Yes, your Honor.

The Court: How many speeds?

The Witness: You can put her at 10 different speeds if you want to.

The Court: Can you throw the boat into the top speed immediately?

The Witness: Yes, you can do that, too.

The Court: You can?

The Witness: Sure, on the top right away.

The Court: Supposing when the Bear was going a mile to a mile and a half an hour you immediately threw the Bear into top speed.

The Witness: No, you can't do that. You know

(Testimony of Nick Milosevich.)

what I mean, I can put engine up on high speed, she will go up from one mile to eight and a half mile. It takes her anyhow three minutes to do it. It takes her three minutes to do it.

The Court: If it was going a mile to a mile and a half per hour——

The Witness: Yes.

The Court: ——in order to get up to eight miles an hour [101] it would take at least three minutes?

The Witness: Yes.

The Court: But how long would it take her to lessen if you threw it into top speed?

The Witness: Oh, she start to pick up right away when you are going to start, you know.

The Court: Well, right away or three or four seconds.

The Witness: Yes. You know, three or four seconds she start pick up higher, all the time she is picking up. I never look on them seconds, you know. That is just judgment what we figure.

The Court: Would the Bear have picked up more speed if you had thrown it into top speed ahead or if you had thrown it into reverse? Which would have picked up the fastest?

The Witness: Ahead.

The Court: Ahead?

The Witness: Yes.

The Court: The reason for that is because the Bear was already moving ahead a little bit?

The Witness: Yes.



(Testimony of Nick Milosevich.)

The Court: And before it could go backwards it would have to stop it?

The Witness: Stop it to go back.

The Court: And go back. More than that, your head speed is a faster speed than your reverse?

The Witness: Than the reverse, yes.

The Court: All right, go ahead.

Q. (By Mr. Shallenberger): Mr. Milosevich, after the collision with the Marsha Ann did you observe any damage on the Bear? A. Yes.

Q. What damage did you observe?

A. When she hit us on the side, starboard side, she break the guards and she hit through the guard. When she went through the guard, she hit the side planking and she moved all them beams. She break the ribs on both sides.

Q. On both sides. You mean on the port side, too? A. Both sides.

Mr. Shallenberger: With your permission, Mr. Callaway.

Mr. Callaway: All right, surely.

Q. (By Mr. Shallenberger): Showing you this model of a purse seine boat, where on this boat? Will you indicate where on this boat?

A. She hit us?

Q. The Marsha Ann hit?

A. Right here, right there, right here.

Q. And this protuberance here is the guard?

A. She hit the guard about seven or eight inch thick, you know, three or four plank together, that wide.

(Testimony of Nick Milosevich.)

The Court: Was the green light on the Bear in about [103] position?

The Witness: In the same position. We didn't have the top pilot. The Marsha Ann——

The Court: I am talking about the green light. The green light was in about the same position?

The Witness: Yes.

The Court: Forward of the middle?

The Witness: Yes.

The Court: As it is on this model?

The Witness: Maybe a foot back or ahead, I don't know.

The Court: On that model the green light is about half-way between the middle of the boat and the bow of the boat.

The Witness: Yes, around about 15 feet.

The Court: Is that about what it is on the Bear?

The Witness: About 15 feet from here to here. She is only 65 feet long.

The Court: Is that about the same on the Bear?

The Witness: Yes.

Q. (By Mr. Shallenberger): When you were at the wheel before the collision, would you indicate on this model where you were?

A. I was right here behind this wheel, right there.

Q. Indicating the spokes?

A. The steering wheel. Yes, I was on the wheel.

The Court: Do you call this the bridge? [104]

Mr. Shallenberger: The flying bridge is about as good a name as any, I guess.

(Testimony of Nick Milosevich.)

The Witness: The flying bridge.

Q. (By Mr. Shallenberger): Where was Mr. Bogdanovich?

A. Bogdanovich was right here, right here.

Q. And where was Mr. Miskulian?

A. Miskulian was right here alongside of me on this left side of me, and we had the whistle right here. The air was connected. This is whistle right here. About here a little block with handle on it, right above the wheel, so he could reach it.

The Court: The witness has indicated the handle on the whistle was immediately above the steering wheel. The whistle itself was back on the mast connected with the handle by a wire or a cord?

The Witness: A wire, yes.

Q. (By Mr. Shallenberger): Now, at the time of the collision, Mr. Milosevich, how much space was there between the bottom of the guard rail and the water?

A. Oh, I should judge around about between six or eight inch clearance, because we had a little over 20 tons of fish on the boat. She was about (indicating) that is, on the portion of it, you know, this much.

Q. And from the guard rail up to this rail to which the rigging is attached, what distance is that? [105]

A. Oh, I should judge around about 28 inches to 30 inches high from here to here.

Q. 28 to 30 inches?

(Testimony of Nick Milosevich.)

A. Yes. Because I didn't measure it, but over two and a half feet, two and a half feet.

Q. You mentioned Mr. Ancich and Mr. Kaiza. Will you demonstrate on the model here where they were?

A. Mr. Kaiza was on this—we didn't have this pilot house.

Q. Here?

A. Here is one box we keep ropes. He was leaning on that box. He was right here.

The Court: Indicating a box at the——

Mr. Shallenberger: Starboard side.

The Court: ——starboard rear of the flying bridge.

A. And we had ice box on this side. Mr. Ancich, he came up to get some food out of it so he was watching this fog, you know, and stayed there for a while, and then he went down and come up. That is all I can tell you about Mr. Ancich.

The Court: Where was Ancich at the very time of the collision?

The Witness: I think he was up. He was up.

The Court: He was up?

The Witness: Yes. [106]

Mr. Shallenberger: In indicating Ancich's position the witness indicated——

The Court: The ice box at the port side.

Mr. Shallenberger: After portside of the top of the pilot house.

The Court: We will take a five-minute recess at this time.

(Testimony of Nick Milosevich.)

(Short recess.)

Q. (By Mr. Shallenberger): Mr. Milosevich, will you indicate on this model where Mr. Svorinich was?

A. Mr. Svorinich was on this side, too, watching net. Right here, he was watching net.

Q. I believe you said Mr. Kaiza was on board? Where was he?      A. Kaiza?

Q. Yes.

A. Kaiza was right here, leaning on box. I told you that before.

Q. That is right. Where was the engineer?

A. Engineer, he was alongside, right here, on pilot house. Alongside pilot house on the deck, top of deck right here.

Mr. Callaway: Indicating a position just aft of the green light?

The Witness: Yes. [107]

The Court: What was that last fellow's name?

The Witness: Hoopes.

Mr. Shallenberger: Hoopes, the engineer.

The Witness: He was top side on the deck.

Q. (By Mr. Shallenberger): Mr. Milosevich, when you first saw the Marsha Ann did you see anyone on her bow?      A. No.

Q. Mr. Milosevich, how much fish was aboard the Bear at the time of the collision?

A. I should judge about 20, 21 ton.

Q. And when you unloaded at Van Camp's dock how much fish did you unload?      A. 13 ton.



(Testimony of Nick Milosevich.)

Q. And was there any fish left in the vessel?

A. Yes.

Q. After you unloaded that 13 ton?

A. Yes.

Q. And how much was left?

A. Oh, about around seven or eight ton.

Q. Why was that?

A. Because there was too much water. We couldn't brail it any more.

The Court: Couldn't bail it?

The Witness: Couldn't brail it.

The Court: Brail? [108]

The Witness: Brail.

The Court: The word b-r-a-i-l?

The Witness: Brail, yes.

Mr. Shallenberger: B-r-a-i-l. You may cross-examine, Mr. Callaway.

### Cross-Examination

By Mr. Callaway:

Q. Mr. Milosevich, if I understand it correctly, Mr. Borcich told you at the time of the collision, first, and again after you were at Van Camp fishery, that he was having trouble with his clutch, is that right? A. Yes.

Q. Twice he told you that, once on the sea and——

A. No. He didn't say it out on the sea.

Q. I misunderstood it.

A. He didn't tell me that. He told me inside.

(Testimony of Nick Milosevich.)

Q. He told you on the inside he was having trouble with the clutch?

A. When he put on alongside shipyard he couldn't back up. He is present right there.

Q. I thought you said—maybe I misunderstood you, that when you were out there you said that.

A. I think he backs up.

Q. You said, "What's the matter, Jack?" and he said, "My clutch is not working too good," or something like that. [109]

A. No, I didn't say that.

The Court: Now, wait a minute.

Mr. Callaway: Excuse me.

The Court: You testified that you said to him, "Why didn't you stop?"

The Witness: Yes.

The Court: What did he say to that?

The Witness: He said, "I think there is something wrong with my clutch."

The Court: He said that?

The Witness: Yes, that he couldn't back up.

The Court: That is what counsel is referring to.

Mr. Callaway: Yes.

Q. Didn't that take place right out there just as soon as the collision happened? A. Yes.

Q. Don't you know, Mr. Milosevich, that the Marsha Ann does not have any clutch?

A. She got the reverse. She have to stop the engine, don't she?

Q. I asked you, don't you know that that boat did not even have a clutch?

(Testimony of Nick Milosevich.)

A. She has got one-way clutch, supposed to have.

Q. All right. From Oceanside to San Pedro is, by sea, 55 miles, is it not? [110]

A. Yes, approximately from town.

Q. Yes.

A. To San Pedro, approximately.

Q. You were about two and one-half miles out of San Pedro at the time this collision happened—right?

A. That is correct.

Q. And you made that voyage from Oceanside between 5:30 and 11:30, is that right?

A. That is correct.

Q. What is the top speed of the Bear?

A. That was the top speed of the Bear. The top speed was about eight and one-half.

Q. Eight and one-half knots?

A. Yes, nautical miles.

Q. When you are traveling under way in fog what whistle signals are you required to give, do you know?

A. I don't understand that what you mean. If it is a fog or clear weather, that is what I want to know.

Q. I said, in fog, where visibility is greatly reduced as it was on this day. Let me withdraw that and ask you a question first. How far could you see just before the collision?

A. Oh, about half an hour before collision—

Q. No, no, no. Just before the collision.

A. Oh, I couldn't see more than 50, 60 feet from us, [111] it was so foggy.

(Testimony of Nick Milosevich.)

Q. 50 to 60 feet?

A. Yes, before collision.

Q. And traveling, moving under those conditions, what whistle signal are you required to give?

A. I was blowing with my whistle.

Q. I didn't ask you what you were doing. I asked you what signal you are required to give by the International Rules, or do you know?

A. I do know. We blow whistle about four times a minute.

Q. If I understood you correctly, you said that those were from four to five seconds long?

A. Yes, five to six.

Q. Five to six?           A. Yes.

Q. What whistle signal would you expect to hear from another boat approaching you in the fog?

A. I heard lots of them.

Q. I asked you what whistle you would expect to hear, what signal from a boat approaching you in such a fog.

A. They was blowing whistle just as soon as we did.

Q. I didn't ask you that.

A. Then I don't understand you.

Q. I am trying to make myself clear. I don't want to [112] confuse you. If you were traveling along in a fog such as that was, what signal would you expect to hear from a boat approaching you?

A. They blow whistle like we do, I told you.

Q. In other words, you do not know what the International Rules require of you in the way of a

(Testimony of Nick Milosevich.)

whistle signal under those conditions, is that right?

A. No, I understand it, because I got lots of experience in that.

Q. Tell me, then, what whistle signal you would expect under those circumstances?

A. If I heard the whistle blowing ahead of me or side of me, I blowing too so they know that we pretty close around there some place, you know.

Q. In other words, you do not know the precise whistle signal that is required by the International Rules under conditions such as we have been talking about, is that right? Can you tell me what the International Rules require of a vessel under way in the way of a whistle signal under those conditions?

A. I understand this, that I was supposed in a fog to blow a horn every half minute.

Q. Every half minute.

A. On that condition, that we were lots of boats running. He is supposed to blow every three or four times a [113] minute.

Q. What whistle signal would you expect to hear from a boat that was not under way in that fog but stopped?

A. He is supposed to ring the bell.

Q. Ring the bell?

A. Ring the bell, because if a boat stays still on the anchor, he rings the bell.

Q. What about the whistle signal?

A. What?

Q. What about the whistle signal that is required?

A. Because, you know——



(Testimony of Nick Milosevich.)

Q. No, no, no. What about the whistle signal that is required under those circumstances?

A. I don't understand that. If you talk my language——

Q. What whistle signal would you expect to hear from a boat that was standing still in the water under the conditions such as we have been talking about, where visibility was reduced to 50 to 60 feet?

A. If a boat standing still, he is supposed to give a bell.

Q. No whistle?

A. A whistle if it is necessary.

Q. Just if it is necessary? A. Yes.

Q. What makes it necessary? [114]

A. Necessary if he gets some boat close to him, he give him also so he wouldn't hit him.

Q. What kind of whistle would he give to boats that get close to him?

A. Give the horn, air horn.

Q. What kind of signal would he make with the air horn?

A. I don't know how many whistles he is supposed to blow. I can't tell you that.

Q. You can't tell me that. All right. What signal, if any, did you give to the Marsha Ann when you first sighted her?

A. We was blowing one every two or three seconds, and at that time I give a short. The crew holler, "Here is a boat on us." That is all. It was too late to do anything more.

Q. So you did not give them any signal?

(Testimony of Nick Milosevich.)

A. No, we did. We blow whistle all the time.

Q. In other words, you were making the same signal that you had been making all along?

A. All the time, three or four time a minute. When we saw the Marsha Ann we still was blowing just the same.

Q. When you first sighted the Marsha Ann you realized at that time that an accident or collision was likely to happen, didn't you? [115]

A. No, I didn't expect that accident going to happen.

Q. You did not when you saw the Marsha Ann 40 to 50 feet off your starboard?

A. Yes. Anyway, if she back up when she saw us, we might avoid collision. Maybe we hit a little bit lighter.

Q. Why didn't you, instead of reversing your engine, put her at full speed ahead?

A. Even if I do that——

Q. I asked you why you didn't?

A. Because you cannot avoid a accident, nohow.

Q. I see. All right. Of course, traveling at one mile per hour you walk at that speed, don't you?

A. Sometime I have, yes.

Q. Sure. In other words, you could reverse your engines at one mile per hour and almost stop instantly, can't you?      A. No, you can't do it.

Q. It don't take any boat lengths to stop at one mile per hour, does it?

A. You might stop the boat if she is empty

(Testimony of Nick Milosevich.)

quicker than if she is loaded. You know, she is pretty heavy.

Q. Wouldn't she stop quicker if she is loaded than she would empty? A. No, nohow.

Q. When you reverse your engine, the engine itself, [116] the reverse of the engine takes effect immediately, doesn't it?

A. You can't stop no boat immediately.

Q. No. But the engine starts reversing immediately, doesn't it? A. Yes.

Q. And that starts the propeller going in the opposite direction, doesn't it? A. Yes.

Q. When you do that, doesn't that tend to make your boat, the stern of the boat, go to one side or the other?

A. I going to tell you. The majority of the time like when we landing our propeller always pull boat a little bit on port side, pull the stern a little bit.

Q. Yes. But it pulls it to either one side or the other.

A. No, the port side. I don't care a damn, because I tried a million times. Excuse it, Judge.

Q. It causes it to sway one way and then the other, is that right? A. I know that.

The Court: Do you mean this boat or all boats?

The Witness: No, just stern, was bring stern like this.

The Court: This boat or all boats?

The Witness: The majority of boats that I went

(Testimony of Nick Milosevich.)

on. They can tell you all things about me, they know that. [117]

Q. (By Mr. Callaway): Isn't it true, Mr. Milosevich, that the first place at which the bow of the Marsha Ann contacted the Bear was up about the starboard beam?

A. When you see her first——

Q. No, no, no. I am talking about where the two boats first came into contact or together up at about the starboard beam?

A. No. I will have to explain that you myself.

Q. Wait a minute.

A. She hit right on the galley door. I know that.

Q. All right. This is a fair representation of the Bear when she was brought in, isn't it?

A. Yes.

Q. And isn't this part here on the guard rail that I point to where the bow of the Bear was being scraped, and finally——

A. That is right, right. She never hit around here no place, no place.

Q. Okay. A. She just hit straight.

Mr. Callaway: All right. I offer this in evidence.

The Witness: She was just moving slowly like a fly on fly paper.

The Court: Admitted into evidence.

The Clerk: As Respondents' Exhibit F. [118]

The Court: Respondents' Exhibit F.

(The document referred to was marked Respondents' Exhibit F and received in evidence.)

(Testimony of Nick Milosevich.)

Q. (By Mr. Callaway): The only damage that you observed on the Marsha Ann was right down here on her bow stem, wasn't it, where I am holding my finger? A. Right there?

Q. Yes. That is all the damage you saw on her, wasn't it?

A. That is all. She never even scratched the paint.

Mr. Callaway: I offer that into evidence.

The Court: The place you referred to is the place on the photograph where the three arrows are?

Mr. Callaway: Yes, your Honor.

The Court: It will be received into evidence as Respondents' G.

The Clerk: Respondents' Exhibit G.

(The document referred to was marked Respondents' Exhibit G and received in evidence.)

Mr. Callaway: I will also offer into evidence a view of the port side of the Bear, being a similar view to the one that the witness just referred to, taken at the same time that the other photograph was taken.

The Court: Admitted into evidence as Respondents' next in order. [119]

The Clerk: Respondents' Exhibit H.

(The document referred to was marked Respondents' Exhibit H and received in evidence.)

Mr. Callaway: Yes. The purpose for the last



(Testimony of Nick Milosevich.)

photograph, if the court please, is solely that a comparison can be made with one side of the Bear as against the other.

Q. Did you, Mr.——

A. Call me "Nick," it is all right.

Q. All right, Nick. It is easier for me. Did you eventually come alongside the Marsha Ann or did she come alongside your boat eventually?

A. Eventually?

Q. Yes. In other words, when you said to Jack here, "Throw me a line," or something, "we are taking water," or whatever you did say, did you move alongside the Marsha Ann or did she move alongside you?

A. We both moved at the same time. We went a little bit ahead and we back up alongside of her.

Q. You backed up alongside of her?

A. Yes. We tie up together.

Q. If I understand it correctly, right after the collision you disengaged your engine?

A. Yes. I didn't shut her down, though.

Q. I didn't mean that. I mean you disengaged her?

A. All right, sir. [120]

Q. And the Marsha Ann was in a position, as you say, at about right angles with your boat?

A. Yes, that is all right.

Q. Then when you realized you were taking water did you back alongside of her this way, or did you pull away or what?

A. That was about three or four or five minutes afterwards.

(Testimony of Nick Milosevich.)

Q. That is what I mean.

A. And back up alongside a little bit and she went ahead a little bit. She put double block on us and put two lines on the side so she wouldn't sink on us.

Q. In other words, she put a boom out with block and tackle around it, with a sling on it clear around your boat?

A. Yes, that is right.

Q. And then on each one she made it fast with two lines?

A. Yes, that is right.

Q. The minute the accident happened your crew started getting aboard the Marsha Ann, didn't they?

A. Because they was scared the boat was going to sink.

Q. I know that.

A. You would, too.

Q. What?

A. You would, too. [121]

Q. I don't doubt it.

A. I would if I could, too, but the captain have to go down with the ship.

Q. But they did, they immediately started getting aboard the Marsha Ann. Didn't you think, Nick, when you saw the Marsha Ann there for the first time that you were going to avoid a collision?

A. No, I couldn't avoid it nohow.

Q. I mean, but you thought for just a split second that you were going to avoid it, didn't you?

A. I didn't. I couldn't say that.

Q. Well, this much of your bow avoided her, didn't it?

A. Yes. She was going for that green light. She was going, about 50 feet distance from us. We

(Testimony of Nick Milosevich.)

was going a mile an hour. You cannot avoid that accident nohow.

Q. My question was this, the next question: When you started scraping or she started scraping you, whichever it was, didn't you give her a hard turn to port to get away from her?

A. I didn't touch anything because——

Q. How do you account, Mr. Nick, for this.

A. All right. Did you took a picture out when you were over there?

Q. Sure, I will give you a picture. This scraping [122] along the rail, and then this indentation right here. I will give you a better view of it.

A. Better give me a better view of it.

Q. Well, here, I will get another one here that might be even better. Can we put this in?

A. This is from shipyards they taken.

Q. That is just another view.

A. See, approximately she was going, Judge, if we was going ahead, tear up all this guard up. We would go ahead.

Mr. Callaway: All right.

A. She hit it. She was straight there.

The Clerk: Respondent is offering another exhibit, your Honor.

The Court: Let us look at it.

The Clerk: Respondents' Exhibit I in evidence.

(The photograph referred to was marked Respondents' Exhibit I and received in evidence.)

Mr. Callaway: Just take a look at it.

(Testimony of Nick Milosevich.)

Q. That was made by the bow of the Marsha Ann, wasn't it?

A. That is right, yes, sir. And this is iron, too, you know, all iron.

Q. Oh, yes, I know it.

A. You see, this is about two feet here. No, I don't think it is more than two feet. You see how far she was going. [123] If we was going full speed, only four or five mile an hour, we tore up all our guard on the back.

Q. Is that so?           A. Sure.

Q. How do you account for the fact, if they hit you broadside, you didn't get just a square "V"?

A. See how she hit?

Q. It was not going straight, was it, when it hit?

A. Yes, but she gain. She slides a little bit. I know from water, too, you know, she slides.

Q. I see. Actually, then, what happened was that the Marsha Ann, when this was made, was in slow——

A. You think she was going this way?

Q. I am asking you.

A. No, no. How? She slide on it. She wouldn't do no damage to no boat, I know that.

Mr. Shallenberger: May the record indicate where he said "two feet" there, the indentation?

The Court: The indentation.

The Clerk: That is on Exhibit I.

Mr. Callaway: Exhibit I, that is right.

Q. Relatively speaking, these two little wooden

(Testimony of Nick Milosevich.)

boats are about comparable to the size of the Marsha Ann——

A. And the Bear.

Q. ——and the Bear. One is the longer and the bigger. [124]

A. Yes.

Q. Well, that indentation that was made, was made at about this angle right here, wasn't it?

A. No, no. You are wrong.

Q. You show me what angle it was made at.

A. This boat 65 feet.

Q. Yes.

A. Well, she went about this far, about this far. She was going in this angle on the beginning.

Q. Just show me.

A. She was going a mile an hour and she was going about four. You can figure with a pencil.

Q. I don't want to figure it out with a pencil. I just want you to be the boss.

A. She was going like that.

Q. Like that?

A. Right straight and no sideways, right straight. I tell you the truth.

Q. All right.

A. I swear an oath I going to tell you the truth, too.

Q. You had not sighted the lighthouse at the breaker, had you?

A. I don't understand that.

Q. You had not sighted at the time of the accident the [125] lighthouse at the breakwater, had you?

A. We heard it. We heard the lighthouse.



(Testimony of Nick Milosevich.)

Q. You were about six or seven hundred feet off of it?

A. No. When we had that collision, we heard it before he hit us.

Q. Heard the lighthouse signal?

A. Oh, yes, we heard the lighthouse before he hit us. We were staying still. You can't enter the lighthouse at seven or eight miles, you know.

The Court: Wait.

Q. (By Mr. Callaway): I show you United States Survey, showing generally, being a U. S. Coast and Geographical Survey No. 5148. This is the breakwater that you were headed for, isn't it, right here? A. This is jetty.

Q. That is the jetty.

A. We was heading for this light direct.

Q. That is what I say. All right, now.

The Court: What does that refer to?

Mr. Roethke: That is the Los Angeles Harbor breakwater light.

The Court: All right.

Q. (By Mr. Callaway): Now, as you were traveling along outside the jetty, you could see the jetty, could you? [126] A. No.

Q. As you went along you were looking for this light, because that is where you wanted to go inside?

A. No, I wasn't looking. We was straight forward. Of course, we heard it. And lots of boats are around here all over, you know, blowing whistles, too. So we stopped, you know, to where she clears before a little bit so we can enter on account of the

(Testimony of Nick Milosevich.)

boats. You might hit lots of boats in that way if you go in. So we were drifting, kick her ahead, see if she was clear, we kick her ahead again. That is all we was doing.

Q. The density of the fog at that time was remaining about the same, wasn't it?

A. No, no. When we got to Seal Beach around here some place—I don't know. Where is Seal Beach here?

Mr. Roethke: That is Long Beach there.

The Witness: Yes. We was right here about seven or eight miles off.

Mr. Roethke: Here is Seal Beach right here.

The Witness: We was right outside here some place. We have, I figure, about not quite an hour to get to the light when we hit the fog at the beginning of the fog.

Q. (By Mr. Callaway): What do you mean you figured you had about not quite an hour to get to the light? A. I am sure. [127]

Q. What do you mean by that?

A. What do I mean by that? I know by my time how much time I have.

Q. The accident happened about 11:30.

A. What?

Q. The accident happened about 11:30?

A. 11:30, yes. That was the light here.

Q. Were you due in at some particular time?

A. We were supposed to be there maybe around 10 minutes before noon. I told the crew, all of them, to be on the watch.

(Testimony of Nick Milosevich.)

Mr. Callaway: I see.

Mr. Shallenberger: Do you want to put that chart in?

Mr. Callaway: Yes, might as well.

The Court: Admitted into evidence as Respondents' next in order.

The Clerk: Respondents' Exhibit J in evidence.

(The document referred to was marked Respondents' Exhibit J and received in evidence.)

Q. (By Mr. Callaway): As I understand it, you first encountered the fog around Newport, light fog?

A. We got around Seal Beach.

Q. I thought you said that that is where the fog got dense?

A. No, I didn't say that. [128]

Q. Well, was it the first fog you encountered at Seal Beach? Was that right? A. Yes.

Q. Where did it get dense to where visibility was down to 50 to 60 feet?

A. Oh, when she was pretty thick we was, I should judge, around about 35 or 40 minutes to the jetty yet, real thick.

Q. Well, when you say 35 or 40 minutes to the jetty, you mean 35 or 40 minutes to the jetty traveling at eight and one-half miles per hour?

A. Going ahead.

Q. Is that right?

A. Yes. Not to the jetty. Don't you take me wrong. We slow down when we hit the fog.

Q. No, I didn't mean that. I meant that you, the way you worded it, was "when you hit the fog you

(Testimony of Nick Milosevich.)

were 35 or 40 minutes to the jetty," traveling at eight and one-half miles?

A. But we slowed down, yes.

Q. At that time you reduced your speed to half speed? A. Yes. Half speed, that is right.

Q. How long did you travel at half speed?

A. Oh, maybe a mile, then I put her down on two miles, way down. I would put her down as I heard lots of boats were going same direction I was going, same direction. So I don't know how many boats, but I heard lots of whistles far distance, three or four or five or six hundred yards or maybe a thousand yards from us you can hear them, see.

Q. Why didn't you stop?

A. I stopped, then I slowed down. I told you I slowed her way down. If you don't hear no whistle alongside of you close, you proceed two or three mile an hour just the same, but when you heard them close, you put your speed on mile, a mile and a half or stop it.

Q. You heard a lot of whistles just before the accident all around you, didn't you?

A. Yes, but they was far away, going same direction.

Q. How can you tell what direction the boat is traveling in by the whistle it makes?

A. I don't understand that.

Q. How can you tell what direction a boat is traveling from the whistle signals?

A. Sure you can tell.

Q. How?

(Testimony of Nick Milosevich.)

A. By echo of the boat. Now, for instance, you going the same direction, with two going same direction, you blow the whistle, I blow mine and about half a minute after you blow your whistle I blow mine again, so I know that you are going same way.

Q. Oh, I see.

A. If you lose that echo, you know that that boat going [130] different direction. You are losing the echo.

The Court: Is there an actual echo or does he just use the term "echo" to mean the sound?

The Witness: Yes, sound it. You can hear it through the air. Echo means off the wall and comes back to you, see.

Q. (By Mr. Callaway): You did not answer the whistles that you heard, did you?

A. What?

Q. You did not answer the whistles that you heard? You just kept blowing a whistle?

A. Yes, I was blowing.

Q. Fire or six seconds long, four or five times a minute?

A. A minute, yes, that is true. And I didn't do that, that is, Mr. Miskulian was doing it for me because I was watching the compass.

Q. You had a man there doing that?

A. Yes, a man alongside blowing the horn for me.

Q. Did you tell him what whistles to give?

A. Yes.

Q. What whistles did you tell him to give?

A. I told him if he didn't hear no boat to give it



(Testimony of Nick Milosevich.)

two or three a minute in that fog and slow. We was going slow speed.

Q. How long had it been before this collision that [131] you heard the last whistle signal from any other boat? A. Before I had a collision?

Q. Yes.

A. Oh, we heard lots of them pretty long distance, two or three hundred yards from us.

Q. How long had it been since you heard the last whistle?

A. I heard it pretty near all the time almost, our port side.

Q. Constantly?

A. Yes, because there was lots of boats.

Q. Now, take this situation: You assumed that all the boats were coming in?

A. Them what I hear, yes, they was coming in with me.

Q. Yes. And you were not looking for any boats that were coming out of the harbor?

A. Sure I do. We had five men to watch for them.

The Court: Now is a good time to take our adjournment until 2:00 o'clock. I have a pre-trial on at 2:00. Do you want to make it 2:15?

Mr. Callaway: Fine.

Mr. Roethke: Yes, sir.

The Court: 2:15. I do not know how long it will take.

Mr. Fall: If the court please, there is an interpreter who is employed over in the legal division

(Testimony of Nick Milosevich.)

of the FHA has [132] made arrangements to be over here at 2:00 o'clock. I was wondering if we could call one witness out of order at that time.

Mr. Callaway: Oh, sure.

Mr. Fall: And use the interpreter, because he wants to get away.

Mr. Shallenberger: If the court please, just a moment. I am about half dead today with a cold. I almost did not get here at all, and I would appreciate an adjournment not later than 4:00 o'clock.

Mr. Callaway: I have no objection, your Honor.

The Court: Can this case be concluded on Tuesday, the 13th?

Mr. Callaway: Your Honor, I could not give you a guarantee on it, but I will do my best. I will tell you this, I think that we have about seven or eight witnesses who will have to be put on after today.

Mr. Shallenberger: I think most of our witnesses that remain to be put on will be much faster than the two, Mr. Milosevich and Mr. Korgan, probably.

Mr. Callaway: I anticipate you will take the rest of the day?

Mr. Shallenberger: I think so, yes.

Mr. Callaway: If you do not, I have a couple of witnesses.

Mr. Shallenberger: No. I think we will. [133]

Mr. Callaway: I think we might be able to do it, but it is going to be a tight fit.

The Court: Well, get some sleep over the week-

(Testimony of Nick Milosevich.)

end because we will probably start at 9:30 and we may work pretty late on Tuesday.

Mr. Shallenberger: That is all right, your Honor. I am willing to do anything you want to do.

(Whereupon, a recess was had until 2:00 o'clock p.m. of the same day, Friday, December 9, 1949.) [134]

Friday, December 9, 1949, 2:15 P.M.

Mr. Shallenberger: I believe Mr. Fall wants to call a witness out of order and I believe Mr. Callaway has already signified it is all right.

The Court: All right.

Mr. Shallenberger: I believe he is also going to use an interpreter for this witness, Miss Bradvica. The witness is Martin Miskulian.

(Anne Bradvica sworn as an interpreter to interpret from English into Croatian and from Croatian into English.)

#### MARTIN MISKULIAN

one of the intervening libelants called as a witness on behalf of libelants and intervening libelants, being first sworn, was examined and testified as follows:

The Court: Does he understand any English?

The Interpreter: Yes, he understood that.

The Court: If counsel do not object to it. The witness apparently understood the oath in English

(Testimony of Martin Miskulian.)

and cut short the interpretation of it. All right, let's go.

The Clerk: He said "yes."

Direct Examination

By Mr. Fall:

Q. Mr. Miskulian, were you a member of the crew of the Bear at the time of the collision with the Marsha Ann? [135]

(This examination is being conducted through the interpreter.)

A. Yes, sir.

Q. And where were you standing just before the collision?

A. I was standing by the pilot house near the skipper.

The Interpreter: He says, "This is the skipper and this is he. This is the position."

Q. He is indicating that he was left of the skipper?

A. On the left.

Q. Was that on the flying bridge of the Bear?

A. Yes, yes.

Q. How long had you been on the flying bridge next to the skipper?

The Interpreter: He said, "one foot," is his interpretation, but I think he misinterpreted that question.

Q. Yes. Will you ask him that question again, how long a period of time?

A. I was in service there.

Q. How long before the accident did you go up on the flying bridge?

(Testimony of Martin Miskulian.)

A. I was on the top before the fog came in.

Q. What were you doing on the top?

A. I was standing there at the wheel.

Q. When the fog came in what did you do? [136]

A. When the fog came, when the fog came and before the collision, the skipper came up and took the wheel. He said he wouldn't swear. He would say, rather, that it was a quarter of an hour.

Q. After the skipper took the wheel what, if anything, did you do?

A. I had the rope in my hand.

Q. The rope to what?

A. The rope to the mechanism that makes a noise, you know.

Q. The foghorn?

A. Trumpet. He calls it a "trumpet."

Q. The boat's whistle? A. Yes.

Q. Who was the skipper?

A. Nick Milosevich.

Q. Milosevich? A. Nick Milosevich.

Q. Did you operate the boat's whistle?

A. Yes. I pulled when he told me.

Q. When who told you?

A. Nick Milosevich is who.

Q. And when you came into the heavy fog how often did you blow the whistle?

A. When it was the heaviest fog of them all I blew [137] it about five times, five or six times.

Q. Five or six times in how long?

A. Five or six times on one minute. He says



(Testimony of Martin Miskulian.)

there would be about a five seconds lapse between each.

Q. Five seconds between each or five seconds for the time that he blew the whistle?

A. Yes, he held it. He said, "I hold it four or five seconds." He is not sure. I am not sure.

Q. Did you see the Marsha Ann before the collision?

A. I saw it approximately 50 feet away, when it was 50 feet away.

Q. Where was it when you first saw it?

A. On the right side.

Q. At that time how fast was the Bear going?

A. I cannot be sure. I cannot be sure. We were going very slowly, about a mile or a mile and a half.

Q. Were the running lights and mast lights of the Bear on at the time or just before the accident?

A. Before the accident occurred all the lights were on because it was very foggy.

Q. Did you see whether or not the lights were burning on the Marsha Ann?

A. I did not observe. I did not look.

Q. From the time you first saw the Marsha Ann until the time of the collision did you see anyone on the bow of the [138] Marsha Ann?

A. I did not see anyone. I saw Jack, the skipper, and another thin lad when they hit us, but I was not sure.

Q. Where were they?

A. Jack was at the wheel and the other fellow was next to him, and I didn't see anybody else.

(Testimony of Martin Miskulian.)

Q. Was there anyone on the top of the pilot house of the Marsha Ann when you first saw the Marsha Ann?

A. No, I didn't see anybody but those two people.

Q. About what period of time elapsed between the time you first saw the Marsha Ann and the time it collided with you?

A. I don't think that there was more than two seconds.

Q. Did you watch the compass on the Bear at any time after you came into the fog?

A. You mean he as an individual?

Q. Yes.

A. No, I did not. The skipper had that job.

Q. Did the course of the Bear change at any time after you saw the Marsha Ann until the time of the collision?

A. From my observation I would say not. I think we were going straight. There wasn't time.

Q. Did you have an opportunity to estimate the speed of the Marsha Ann?

A. From the impact, I would say they were going fast. [139]

Q. Are you able to judge in miles an hour?

A. I should. I have been on the sea a good many years. From my experience on boats, I would say the boat, the Marsha Ann, would have to be going four or five miles.

Q. Do you mean nautical miles?

A. Yes, nautical.

(Testimony of Martin Miskulian.)

Q. How long have you been going to sea as a fisherman?

A. Here, I have been fishing here for five years, but since 1913 I have been on the sea.

Q. During the five years that you have fished here have you fished sardines each year?

A. Yes, I have fished for sardines here and San Francisco and Monterey and Alaska.

Q. After the date of the collision until the middle of February, 1949, did you engage in any employment?

A. No, I didn't, and not even in March.

Q. Why?

A. I looked all over but I just didn't get an opportunity.

Q. What type of employment did you look for?

A. I was looking for a fishing job.

Q. What did you do with reference to looking for employment?

A. I went from boat to boat. I was to San Francisco and Monterey. [140]

Q. Between all that time between November 30th and in March did you continuously look for employment?

A. Surely I did. I looked all around. In March I got a job on the *Buccaneer*.

Mr. Fall: You may cross-examine. Say, I do have another couple of questions to ask.

Q. After the collision—I mean immediately after—what happened to the *Bear*?

A. It was broken.

(Testimony of Martin Miskulian.)

Q. Did the Bear continue going forward?

A. No. No, the way that he, meaning the Marsha Ann, hit us we stopped, and he was showing you that here is the position and that they were carried ahead.

The Court: The record will show that the witness is placing one hand at right angles to the palm of the other.

Q. (By Mr. Fall): Do you mean that the Bear continued forward, or did it go sideways or did it stop?

A. Straight, straight ahead, front.

The Court: Now, the witness' hand demonstrated one thing and the translation was another. Ask him which hand is the Bear and which hand is the Marsha Ann.

The Interpreter: That is the Marsha Ann.

Q. (By Mr. Fall): His right hand is the Marsha Ann and the left hand is the Bear?

A. That is right. [141]

Q. Will you now just show us in what direction the Bear went after the collision?

A. After he hit us, he didn't separate from us, he shoved us apparently to the side together. They were together.

Q. Did the Bear remain upright or did it keel over to one side or the other?

A. It was on the water but it was turned a little bit.

Q. Towards which side?

A. On the left, on the left it tipped.

Q. The left tipped down or up?

(Testimony of Martin Miskulian.)

A. Down.

Mr. Fall: I have no further questions. You may cross-examine.

Cross-Examination

By Mr. Callaway:

Q. Now, you say you went to Monterey and San Francisco in March seeking employment?

A. Yes.

Q. Fishing? A. Yes, for fishing.

Q. Sardines?

A. No. I was looking for an opportunity to go to Alaska.

Q. There is no season open in Monterey or San Francisco [142] in March for any fish, is there?

A. Not for sardines, no. I was interested in just finding work at that time.

Q. As a matter of fact up until this year there have not been any sardines in either Monterey or San Francisco, even during the season?

A. No, that is right. But there is other fishing. You can fish anchovies in Monterey.

Q. About how many feet was the Bear pushed sideways?

A. Do you mean—he wants you to understand that the Marsha Ann was not separated from the Bear but we were going this way.

Q. I understand. I am trying to find out how many feet it was pushed sideways.

A. I would say at least three minutes or probably four.

Q. Three or four minutes? A. Yes.



(Testimony of Martin Miskulian.)

Q. How many feet in those three or four minutes? A. I can't estimate the feet.

Q. Was it a boat length of a boat the size of the Bear?

A. I am sorry. I cannot tell you whether it is three meters or 30 meters, but all I know it was about three minutes. I was not looking at the water.

Q. In other words, you were traveling through the water sideways three or four minutes? [143]

A. Yes. I would say at least three and probably four.

Q. When the Marsha Ann struck she did not bounce off but just continued?

A. No, no. Afterwards it was full of water and after the collision the two were separated. That was several minutes after.

Q. Was the Bear traveling at about the same speed at the time of the collision that it was, say, a minute before the collision?

A. I think that the Bear was always moving slowly and I cannot say at the time of the collision whether—he said “he”—at the machinery would have made it go faster or slower, but we were going very slowly.

Q. Did you take your station on the pilot house at the same time that Nick took the wheel?

A. I was up there before him, but as soon as the fog rolled in he came up.

Q. Who did he relieve?

The Interpreter: You mean he?

(Testimony of Martin Miskulian.)

Mr. Callaway: No, the skipper, the helmsman.

A. He relieved me, because I was on the wheel before.

Q. And who did you relieve?

A. There was just the two of us and I started. There wasn't any fog around.

Q. When did he go on the wheel? Ask him when he went [144] on the wheel.

A. I think I went on, I think around 10:00 o'clock.

The Court: Who does he mean by the skipper? Does he mean Korgan or Milosevich, Nick or Korgan?

A. Nick Milosevich, he is the skipper.

Mr. Callaway: The captain of the boat. The skipper was Korgan, wasn't it?

A. Yes. But Nick is the owner of it. He relieved me and George was sleeping.

Q. Did you relieve Korgan?

A. Yes. He called us at 10:00 o'clock.

Q. How long had you been traveling in the fog before the collision?

A. I figure about 15 minutes, over 15 minutes before.

Q. Hadn't you been traveling in the fog all the way from Seal Beach?

A. No, it wasn't foggy all the time. When we left it was clear.

Q. I understand when you left Oceanside it was clear, but I mean didn't you run into heavy fog

(Testimony of Martin Miskulian.)

about Seal Beach, about 10 miles from where you were?

A. I believe that the fog set in, from my calculating, about, I would say, 10:45 I think.

Q. And the accident happened about 11:30?

A. Yes, about that time. [145]

Q. So you had been traveling in the fog 45 minutes, instead of 15?

A. Yes. I can't give you the exact. I can't give you the exact amount of figures, but I can only tell you what I remember.

Q. All right. Did you blow the whistle when Nick told you to or did you blow it on your own volition?

A. When he told me. When he told me, then I pulled.

Q. In other words, if he would say to pull it, then you would pull it, and if he did not say to pull it, you would not? A. Yes.

Q. Did you hear any whistle signals from any other boat, say, within a minute before the accident happened?

A. Yes, there was boats all around and I heard them.

Q. What signals were you expecting from a boat that was moving in the fog?

A. There is no special kind of signal, just the signal that there is a ship afloat.

Q. And what signals were you expecting from a boat that was not under way in the fog?

(Testimony of Martin Miskulian.)

A. What kind of a boat and signal? Would you read?

Q. For a boat that is still in the water in the fog.

A. I don't know. I am not the skipper.

Q. You were navigating the boat up until 45 minutes [146] or some such time before this accident happened, were you not?

A. He said it was not 45 minutes that I was actually at the wheel. It was only 15 or 20 minutes.

Q. Very well. Then you were coming through the fog up until 15 minutes before the accident happened, at the wheel, were you not?

A. Just I think so.

Q. How would Nick signify or indicate to you when you were to blow the whistle?

A. He told me to pull.

Q. And did he tell you how long to blow?

A. Yes, long.

Q. Well, when you say "long" what did he say to you in that particular?

A. When he would say "long" I would blow it for about five seconds, maybe more.

Q. How did you estimate the length of time you blew it?

A. That is the way I think. I can't tell you exactly whether it was four, five, or six. I just guess. But, he says, I know it was longer than usual.

(Testimony of Martin Miskulian.)

Q. In other words, you did not make any measurement of the blast, you estimated it to be that long? A. Yes, I just estimated it.

Q. So five or six times during the minute Nick would say, "Give her a long blast," is that right?

A. He said there are three or four boats around us and, as a boat came near—maybe 10 or 20—as a boat came near, he would say to blow.

Q. But he did not tell you to blow at other times when you did not hear the whistle from some other boat, is that right?

A. He always answers all the boats, and if there is no answer, he blows anyway, and it is because it was foggy.

Q. And Nick was telling him when to do that?

A. He always told me.

Q. All right. Have you got any other type of sounding device other than the whistle on the boat?

A. A horn.

Q. Got a horn? A. A horn.

Q. Just like an automobile horn or at least that type?

A. No. He says it is different because it has got a tongue in the horn, because it makes a different type of token.

Q. I understand that, it makes a sound like this, doesn't it, "beep-beep"? A. No.

Mr. Callaway: It does not.

Mr. Fall: A very good imitation.

Q. (By Mr. Callaway): I want to ask you this



(Testimony of Martin Miskulian.)

question: [148] Were you using the horn at any time as you were coming through the fog?

A. The whistle and this—he calls it a bell—and he said, and that is all there is.

Q. My question was, was that being sounded?

A. No, no, just the whistle.

Q. Just the whistle. All right. You stated that it was only two seconds from the time you sighted the Marsha Ann to the collision.

A. I figured that it couldn't have been more than that. He said, "I just saw the top and the first thing I knew we were hit, and it couldn't have been over 40 to 50 feet."

Q. In other words, you mean to testify that the Marsha Ann traveled 40 to 50 feet in two seconds?

A. I don't know exactly. That is what I thought. I thought he was going to hit our green light but he hit us 12 feet away from it.

Q. The first time that the Marsha Ann came in contact with your boat the front end of it came in contact right about the starboard beam?

A. I thought he was going to hit up on the green light. I was standing up there.

Q. Yes.

A. And I thought he was going to hit me. You see, this position. [149]

Q. Yes.

A. He missed us there and he hit us down below.

The Court: The record will show that the witness was demonstrating with his palms perpendicu-

(Testimony of Martin Miskulian.)

lar to the side of the model boat that you placed before him.

Q. (By Mr. Callaway): But he scraped you, the Marsha Ann scraped you, starting about here back to amidship, did it not?

Mr. Shallenberger: Let the record indicate where he started.

A. No, he didn't. I figured he was going to hit me there, but it missed us. It didn't touch us until it plowed into us.

The Court: The question referred to scraping from a portion on the side of the boat immediately below the green light to back about amidship.

A. No, it didn't do anything but hit us there.

Mr. Callaway: All right.

A. That is why I figured that if he hit me at the green light and he hit us amidship, it couldn't have been over two or three seconds, because it is only 14 or 15 feet.

Mr. Fall: May I have that last answer read, please?

Mr. Callaway: That was a voluntary statement. There was no question pending when he was doing the last part of the conversation. [150]

Mr. Fall: Well, may I have the question and the answer that the reporter has?

Mr. Callaway: Sure, certainly.

(Record read by the reporter.)

The Court: I think that he said he figured he was going to hit us at the green light, and then he hit us—he didn't say where—14 feet back.

(Testimony of Martin Miskulian.)

Q. (By Mr. Callaway): Now, did you continue to watch the Marsha Ann from the time you first sighted her up to the point of impact?

A. It was so fast, when I saw her she hit us, and I figured how was she going to hit us.

Q. Well, my question was: Did you continue to have the Marsha Ann under your observation?

A. Yes. Yes, I did. I was watching where she was going to hit us.

Q. And did you give any whistle signal when you first saw the Marsha Ann?

A. I didn't have time.

Q. It is not your testimony, is it, that the Bear did not veer to port or starboard, but that you were watching the Marsha Ann and don't know whether it did, is that right?

Mr. Fall: If the court please, I do think the question is a bit complex.

The Interpreter: Oh, excuse me. [151]

Mr. Fall: I think it could be simplified considerably.

The Court: Read it, Mr. Reporter.

Mr. Callaway: Maybe the witness can understand it.

(Question read by the reporter.)

The Court: You have got too many "nots" in there. I will sustain an objection.

Mr. Callaway: All right, your Honor.

Q. In the short period of time that elapsed between the time that you saw the Marsha Ann first

(Testimony of Martin Miskulian.)

and the collision you don't know whether your boat veered to port or starboard or not, do you?

A. How shouldn't I know when it hit us and took us along?

Q. I may have asked this question but I don't think I ever got an answer to it. In the three or four minutes that the two boats traveled, the *Marsha Ann* forward and the *Bear* to its side, how far did it travel?

Mr. Fall: Just a minute, please. I object upon the ground that the question is uncertain. He said, "How far did it travel?" Now, there are two boats.

Mr. Callaway: Did they travel, then?

The Court: Well, the question has been asked and answered, counsel.

Mr. Fall: And it has been asked and answered if it refers to the *Bear*, because he went into that in detail on [152] several questions.

The Court: The objection is sustained upon the ground that it has been asked and answered.

Q. (By Mr. Callaway): What signal do you give, Mr. Witness, when you want to warn another boat of approaching danger?

Mr. Fall: The question is uncertain in that it does not relate the circumstances.

The Court: Just a minute.

Mr. Fall: It does not relate to circumstances under which the boat is traveling at the time.

The Court: Objection overruled. This is cross-examination.

(Testimony of Martin Miskulian.)

Mr. Callaway: Go ahead.

The Interpreter: I have forgotten the question.

Mr. Callaway: Read it to her, Mr. Reporter.

(Question read by the reporter.)

A. I give the kind of a signal the skipper tells me to give.

Q. How does he signify to you he wants you to give that particular signal?

A. Well, whatever he tells me after he decides whether it is short or long, that is the signal that I give.

Q. In other words, the only signals that you give are either a short signal or a long signal, is that right? [153]

A. Yes. That is the kind that I was giving, the long ones, and most of the time it is a long one.

Mr. Callaway: That is all.

### Redirect Examination

By Mr. Fall:

Q. Mr. Miskulian, when you referred to 14 or 15 feet in answer to counsel's question wherein—this is going to be long. I ought to go back again to the question.

The Court: Is this necessary? I mean I don't want to stop you, counsel, but——

Mr. Fall: I don't know that it would clarify the situation anyway. I will withdraw the question.

Mr. Callaway: I have nothing further.



(Testimony of Martin Miskulian.)

The Court: Ask the witness his full name. I do not think you have it for the record.

A. My full name is Martin Miskulian.

The Court: You may step down.

Mr. Shallenberger: Did you wish to continue your cross-examination of Mr. Milosevich, Mr. Callaway?

Mr. Callaway: Yes.

Mr. Shallenberger: I beg pardon?

Mr. Callaway: Yes.

Mr. Shallenberger: Get Mr. Milosevich. [154]

## NICK MILOSEVICH

(Recalled)

### Cross-Examination

(Resumed)

By Mr. Callaway:

Q. Nick, how long had you been at the wheel before the accident happened?

A. How long before?

Q. Yes.

A. Oh, about two hours, I should judge.

Q. About two hours. Who did you relieve?

A. George Korgan.

Q. Wasn't this man, Martin Miskulian, at the wheel when you took over?

A. Yes, he was when it was clear weather. We change off once in a while, you know. I always was there.

Q. I know, but I am not asking you about the

(Testimony of Nick Milosevich.)

condition of the weather. I am asking you now, wasn't he the man you relieved, relieved at the wheel? Wasn't he the helmsman at the time you took over?

A. You know how we do. Shall I explain it to you?

Q. No, I am asking.

A. He was at the wheel, yes, at times for a very little while.

Q. All right. When you came up it was already foggy, wasn't it?

A. No, it was still clear. [155]

Q. Still clear? A. Yes.

Q. He was right at your left-hand side, wasn't he? A. He was left side of me, yes.

Q. And he was the one that was handling the wheel? A. Yes.

Q. Now, did he blow that whistle when you told him to or did he blow it when he decided to blow it?

A. No, I told him every time.

Q. You told him five or six times a minute?

A. No, three or four times a minute.

Q. Three or four times a minute you would say "Blow the whistle"?

A. And hold it about four or five seconds. Sometimes he was holding it, you see.

Q. You told him to blow it three or four times a minute and to hold it five or six seconds?

A. Yes. That was when we was in fog.

Q. I understand. Did you blow the whistle in answer to a whistle from some other boat or did

(Testimony of Nick Milosevich.)

you blow it whether you heard any other boat's whistle or not?

A. We did always answer to boat, and if not, we was blowing just the same. That is the rule of the sea, too, in the fog, you have to blow it.

Q. We have already been into the rules of the sea. [156] I am trying to find out what you did.

A. Yes.

Q. Why didn't you tell him to blow the whistle every three or four times a minute once, instead of having to repeat it to him every three or four times a minute?

A. Well, I got that habit, you know, because he is kind of a greenhorn.

Q. You were talking to him practically all the time about the whistle, weren't you?

A. Sure. We was watching about boats. You know, the boats was blowing farther away.

Q. What part of the Marsha Ann did you first see? A. Me?

Q. Yes.

A. I saw her around about 50 feet.

Q. No, not distance. What part of the boat did you first see?

A. I seen the bow and the pilot house, both.

The Court: Read the answer.

(Answer read by the reporter.)

Q. (By Mr. Callaway): You saw them both at the same time? A. Yes, sure.

Q. The pilot house is some 50 feet from the bow, isn't it? [157]

(Testimony of Nick Milosevich.)

A. It is a little bit behind us. You can see a little more far.

Q. The bow is considerably higher than the pilot house, isn't it?

A. The bow is higher than the pilot house, yes.

Q. The bow of the Marsha Ann is about even with the top of the pilot house, isn't it?

A. Yes, sure. She is high.

Q. Is about even with the top of your pilot house? A. Yes, sure. She is higher.

Q. Did you tell the whistle man to blow the whistle?

A. What has he got to blow? She is too late any more.

Q. You had four or five seconds. It didn't take that long to blow the whistle.

A. He was blow like the dickens all the time, so what you going to do about it if it is too late any more when she hits?

Q. I am not talking about when she hit. I am talking about when you first sighted the boat.

A. That is the same old story. We was blowing a couple of times before she hits. That two, or three seconds it was too late to stop it, you see, to stop the Marsha Ann.

Q. What signal did you tell him to give the Marsha Ann when you sighted her?

A. He was very short. [158]

Q. What signal did you tell him to give?

A. Like he used to do always.

(Testimony of Nick Milosevich.)

Q. Just the same short whistles?

A. Sure, when she is close like that.

Q. One whistle?

A. One whistle, then the next one. It was too late to give him any more because she hit us in about 15 or 20 seconds. She was on us.

Q. In 15 or 20 seconds she was on you?

A. Maybe before that time. I didn't have no watch in my hand. I don't know nothing about it, but it was pretty fast.

Q. Nick, what is the signal, if you know, that is required to be given under the International Rules to warn an approaching vessel of danger?

A. Approaching vessel of danger?

Q. Sir?

A. You mean to approaching vessel in danger?

Q. To warn an approaching vessel of danger.

A. Generally, just sometime they blow, I think, about five whistles.

Q. I am not talking about what they sometimes do. I am asking you if you know what the International Rules require you to do?

A. I don't understand that. [159]

Q. You don't know, then, what the International Rules require of you in that regard?

A. That is all I know, about five whistles in the danger, and three whistles for calling somebody or best regards to that vessel, I know.

Q. You were not trying to pay your regards to anybody on that day, were you?



(Testimony of Nick Milosevich.)

A. No, because usually you don't have no time to do anything that day. I don't know your name, but to tell you the truth, anyhow, you don't have no chance to do anything that time.

Q. All right. When you got into Van Camp's and you said you had seven or eight tons of fish still in the hold, could not get them on account of water, you took your boat right from there to dry dock, didn't you?

A. No, we didn't. He took us across the shipyard over to Rados and we unload the net first. Before we start to unload the net Borcich left. He asked me if we need any more help. I said, "No." Before that, again, he couldn't back up part way alongside, you know, to stop the boat.

Q. That is when he was having clutch trouble?

A. Yes, that is all. Maybe he is have, maybe he is not. Maybe he couldn't start the engine that second. He said, "Nick, please back up for me a little bit." I did for him. [160]

Q. I see.

A. Then he left when we alongside the wharf to unload the net, and then we went away late on the evening.

Q. The fish were still in the hold, weren't they?

A. Yes, and lots of water, too.

Q. I understand that. But the water drained out when you got on the way, didn't it?

A. Yes, because they make hole in that. They drill holes down in the bottom.

Q. Did you throw the fish away?

(Testimony of Nick Milosevich.)

A. Sure, they did. The shipyard did it.

Q. Why didn't you take them?

A. How am I going to take them? You think I am going to take them on my shoulders? I wouldn't do it. That is too far away to carry it.

Q. Well, the point I make is, you didn't just let them stay on the boat and rot there?

A. You know what happen, that the shipyard take care of the boat. That is their business whatever they want to do with it.

Q. Didn't they sell the fish for you?

A. I don't know. We never got no penny out of it. I know they fill up lots of them 50-gallon drums right there alongside the boat. You can ask Rados, he will tell you the truth. We found out from him lots of the fish went out. [161] They drill hole, I should judge one plank about 12 foot long, so the fish goes out and they wash out, all the fish goes out, because I was there when he did it.

Q. Insofar as whether or not you go out to fish or whether you do not, that is up to the skipper, isn't it? A. That is right.

Q. If you don't want to go out, you don't go out? A. No.

Q. Regardless of the reason?

A. No. You know, sometimes the crew force you to go out, too, you know.

Q. Well, you can get away, can't you?

A. Well, yes, you can do that.

Q. In other words, you can quit any time you want to? A. Yes, that is right.

(Testimony of Nick Milosevich.)

Q. If the skipper does not want to go out to fish and the crew does, then you just don't go, isn't that right?      A. Yes, so we stay in.

Q. Had you been on these three nights that you had been out during that season on the boat fishing?      A. Yes.

Q. Who were you fishing for then?

A. We was fishing for a fellow by name Tomacich.

Q. You were fishing for fresh fish?

A. And Benn. [162]

Q. They handle fresh fish, isn't that true?

A. No. They was agent for American Canning Co. You know them, all them companies in Wilmington, three or four different canneries around there.

Q. What were you fishing for, mackerel or sardine?

A. No, whatever you can catch. We got, I think, 60-some ton in three nights one after another, so about \$3,600 fish it was.

Q. This was the first trip you had ever made for California Seafood?

A. Yes, that was first one.

Mr. Shallenberger: I beg pardon. Just to keep the record straight you said, "California Seafood." I presume you were referring to "Company," not a seafood fish.

Mr. Callaway: I was. I was referring to the cannery, not to a species of certain fish.

(Testimony of Nick Milosevich.)

Mr. Shallenberger: Very well.

Q. (By Mr. Callaway): Now, aside from you were there any other people on board that had ever fished on that boat before that particular night?

A. I think we had George Korgan.

Q. Well, I know. I am not talking about the owners now. I am talking about the crew.

A. I remember Ancich was with us.

Q. You and Ancich. He was the cook, wasn't he? [163]

A. Yes.

Q. Were the only members of the crew that were on board that had ever been out on that boat before that night, weren't you?

A. I can't recall that.

Q. Now, at that particular time San Pedro Harbor was full of boats. You had these boats down here from San Francisco, Monterey, and some from Washington and Oregon, is that right?

A. There was lots boats in Pedro, yes. That is right.

Q. Yes.

A. Lots of them was working, too.

Q. Lots of them were not even going out at all?

A. I don't know anything about it. We had our chance, I know. I can prove that, too.

Q. And that was because there wasn't any sardines to be found, wasn't it?

A. Shall I explain this to you? We can fish for five-ton, small boats, make two or three hauls. We got 15 or 20 ton on that boat and these big

(Testimony of Nick Milosevich.)

boats, they can't do that. They have to look for little bigger schools, not less than 20 ton or up, and it don't pay for them to go out. We go alongside fish. If we find small school, we get it, for small boats pays more than for big ones. [164]

Q. How does it happen, then, that you did not fish but the three nights in November?

A. Yes, we did. We got fish every night.

Q. But you testified, and so did Mr. Korgan, that you only fished three nights the whole month of November.

A. Three nights, yes, that is the only three nights we fished.

Q. How does it happen you did not go out more often?

A. Wait a minute. I will tell you why. Cannery wants to cut its price on \$45.00 and union wouldn't let the crew go out.

Q. No. That was over—— A. What?

Q. ——in October, wasn't it?

A. No, no. That is the same company. That is cheap company down in Wilmington. It was for \$45.00 and we won't do it.

Q. I know, but that strike was over.

A. The strike was over, but where we get the chance for boat, couldn't we catch under 20-ton limit, couldn't we catch mackerel, Spanish mackerel, sardines, couldn't we? That is why we went out.

Mr. Callaway: That is all. [165]



(Testimony of Nick Milosevich.)

Redirect Examination

By Mr. Shallenberger:

Q. Mr. Milosevich, I believe you testified this morning that you were supposed to be somewhere at five minutes of 12:00. Where did you mean?

A. Five minutes of 12:00?

Q. Yes. You told Mr. Callaway.

A. We supposed to be on lighthouse.

Q. On the lighthouse?

A. Yes, on the jetty at San Pedro entrance.

Q. You also said this morning that it got very foggy 35 or 40 minutes from the jetty?

A. That is correct.

Q. Will you indicate on this chart, Respondents' Exhibit J, what you meant by the jetty when you said 35 or 40 minutes to the jetty.

A. That end. We was right here, going 295 degrees to this jetty here, see.

Q. Yes.

A. This is the jetty. We was going straight for this light, for home, because we hit it. You see, we slowed down. We was going very slow, about two-one-stop, kick in, stop, kick again. We had lots of whistles around the entrance there, maybe 30 to 40 boats there, maybe more.

Q. By "stop" when you were slowed down, when you were [166] stopping and kicking it ahead, etc., is that the stop which you meant when you said 35 or 40 minutes?      A. Yes.

Q. From the jetty?

(Testimony of Nick Milosevich.)

A. No. We was going more ahead all the time. We was from the jetty about two and a half miles approximately, not quite three miles to the jetty. But I can recall that easy, because by that time 11:30, it takes about 20 more minutes to get there. We be there pretty near noon. I know exactly where we were holding course for her.

Q. How far——

The Court: Wait just a moment, please.

Mr. Callaway: Just a minute. Will you read the answer?

(Answer read by the reporter.)

Q. (By Mr. Shallenberger): When you picked out a point there and said that it was 35 or 40 minutes from that position to the jetty did you mean in clear weather or foggy weather?

A. That was in foggy weather where we was there.

Q. And the dense fog that you were talking about when the Marsha Ann hit you?

A. Yes. We hit the fog around here some place like and we got right here. I ain't got no ruler here where I can show you.

Mr. Callaway: The witness indicates, first, we hit fog around here some place about opposite Seal Beach. [167]

A. Seal Beach was all full of fog. I know that is true. Borcich can tell you that, too. He was in fog, too. Borcich was in fog.

(Testimony of Nick Milosevich.)

Mr. Callaway: Well, we won't argue about that now.

Mr. Shallenberger: I have no more questions.

Mr. Callaway: Nothing further.

The Court: You may step down.

The Witness: All right.

The Court: Yes, you may step down. Thank you.

Mr. Fall: Libelants will call Mr. Svorinich, Peter.

### PETER SVORINICH

one of the cross libelants herein, called as a witness on behalf of libelants and cross libelants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Peter Svorinich.

### Direct Examination

By Mr. Fall:

Q. Do you spell that S-v-o-r-i-n-i-c-h?

A. Exactly, sir.

Q. Mr. Svorinich, were you a member of the crew of the Bear at the time of the collision with the Marsha Ann?

A. Yes, sir.

Q. And you were employed on the vessel as what?

A. I beg pardon? [168]

Q. What were you employed on the vessel—as a fisherman?

A. Yes.

Q. And just before the accident occurred where were you on the boat?

(Testimony of Peter Svorinich.)

A. I was on the stern, on the nets. I was patching nets.

Q. Were you on the port side or the starboard side? A. On the port side.

Q. Pardon? A. On the port side.

Q. On the port side. Did you see the Marsha Ann at any time before the collision?

A. No, sir.

Q. Immediately after the collision what happened to the Bear?

A. When the Marsha Ann hit the Bear the Bear immediately did listing, you know, and I jump on the deck. Of course, I was excited. Really, I don't know what was.

Q. What happened to the Bear?

A. What is happen on the Bear?

Q. Yes. A. Leaking. She started leaking.

Q. Did the Bear continue to go ahead?

A. No. I can't remember that, sir. [169]

Q. Did the Bear list from one side to the other?

A. He listing, absolutely, listing on the port side.

Q. Well, did you see the Marsha Ann after the collision?

A. I see the Marsha Ann was alongside with the bow up against the Bear. That is all what I can see.

Q. On what side was the Marsha Ann? I am referring on what side of the Bear was the Marsha Ann?

(Testimony of Peter Svorinich.)

A. Marsha Ann was on the right side of the Bear.

Q. And was it at right angles or at some other angle?

A. No. It was, I believe—I was really excited, because, really, I was scared stiff. So I see the Marsha Ann was up like this against the Bear. That is all I know because I was excited.

The Court: The witness demonstrating with one palm perpendicular to the palm of the other hand is what he saw after the collision.

Q. (By Mr. Fall): Did you obtain any other employment? A. I beg pardon?

Q. Did you obtain any other employment?

A. Did I go looking for job, is that what you mean?

Q. You wait until I finish the question. Did you get a job at any time between November 30th and February 15th of the following year, and that will be February 15th of this year? [170]

A. No, sir.

Q. Did you try to look for a job?

A. Absolutely, I looking all over to get a boat.

Q. Speak up a little louder.

A. I says I was always looking for a job during this season to get some other boats, all I was looking for.

Q. Keep your voice up so we can all hear.

A. I was always looking during that time, you know. I was looking for job.



(Testimony of Peter Svorinich.)

Q. Did you try to get any jobs fishing for sardines? A. Yes.

Q. What did you do with reference to trying to get a job fishing for sardines?

A. I was looking at so many boats, you know, looking for skippers I know around there.

Q. What did you do with trying to get a job?

A. I went on dock, down below, talk with the crew, talk with the skipper. I know the people, you know, and ask if any chance to get on there and they say "no."

Q. How many skippers did you talk with?

A. Oh, I know lots of them. I know lots of them. I don't know. I can't remember. I know the Long Island. I ask the New Republican. I ask him on the Sea Spray. I forget what you call him, the name—Lobo. I ask Lobo, Alec Lobo. I ask so many I don't know. I forgot. [171]

Q. How long have you fished for sardines in California waters? A. Oh, since 1938.

Q. Have you fished every year since 1938?

A. No, sir. No, sir.

Q. How many years since 1938 have you fished for sardines?

A. Fished in 1938 and 1939, February, then I quit.

Q. All right. When did you start in fishing again? A. 1945.

Q. And did you fish sardines each year from 1945 up until the present time?

(Testimony of Peter Svorinich.)

A. That is right.

Mr. Fall: You may cross-examine.

The Witness: I beg pardon?

Mr. Fall: I was talking to counsel here.

The Court: Just a minute.

Mr. Fall: You stay right there. Counsel will want to ask you some questions.

### Cross-Examination

By Mr. Callaway:

Q. You say at the time this happened you were mending nets? A. Yes, sir, I patching them.

Q. Were these nets that are shown on Respondents' [172] F hanging around on the pilot house like that?

The Court: When, at the time of the collision?

Mr. Callaway: Yes, sir.

A. That is the boat on the dry dock.

Q. What? A. That is a boat in dry dock.

Mr. Callaway: I didn't get the answer.

Mr. Fall: "That is a boat in dry dock."

The Witness: That is a boat in dry dock.

Mr. Callaway: I am asking you if those same nets were on the pilot house?

A. That is old nets. I beg pardon. That is the old nets we have on the pilot house. The pilot house was wood, and the owner-skipper say one time to me—I hollered at him, too, "Please, can you help us?" I said, "Why not"——

Q. No, no. My question is very simple, Mr. Svorinich. Were these nets hanging on the pilot

(Testimony of Peter Svorinich.)

house like this at the time of the collision, or were they put there after the accident?

A. Oh, no, that was after that, after that.

Q. That is all I want to know. Did you board the Marsha Ann right away?

A. I beg pardon?

Q. Did you board the Marsha Ann? Did you get on the Marsha Ann? [173]

A. No. I was on the boat when I holler to skipper of the Marsha Ann. He was double-block. We put the double-block and tie the boat alongside and they take us inside.

Q. Did you stay on while the Bear was being towed in? Did you stay on?

A. Yes, I do. And really I never run to the Marsha Ann. Just I run when we come alongside on the—what do you call it? What do you call that, Van Camp, where we discharging fish.

Q. How long was it after the collision before the two ships were parallel or side by side?

A. No.

Q. How long was it, how much time?

A. I don't know that.

Q. What?

A. I never saw the Marsha Ann going alongside before. They never give us double block to tie.

Q. Do you know what I mean by "time"? How long was it before your ship got alongside the Marsha Ann, that she tied a sling around you, how much time?

A. I don't know. I can't tell you.

(Testimony of Peter Svorinich.)

Q. What?

A. I can't tell you how many minutes or how many quarter of an hour. I don't know because I never look on time. [174]

Q. You saw right away that the Bear was leaking, didn't you? A. Yes.

Q. And you thought if something was not done for her she was going to sink, didn't you?

A. Yes, sure. I was afraid.

Q. So I take it that you got this help from the Marsha Ann as quick as you could get it?

A. Yes.

Q. Is that right?

A. Yes, that is right.

Q. Who moved to the side of who? Which boat moved, or did it drift into position?

A. Oh, I don't know, sir, that.

Q. You don't know?

A. No, sir, I don't.

Mr. Callaway: That is all.

Mr. Fall: No questions.

Mr. Shallenberger: That is all.

The Court: Step down.

Mr. Fall: Let us have Mr. Kaiza, John.

### JOHN KAIZA

one of the libelants herein, called as a witness by the libelants, being first sworn, was examined and testified as follows: [175]

The Clerk: What is your name?

The Witness: Kaiza, John.

(Testimony of John Kaiza.)

Direct Examination

By Mr. Fall:

Q. That is K-a-i-z-a? A. Yes, sir.

Q. Mr. Kaiza, were you a member of the crew of the Bear at the time she had the collision with the Marsha Ann? A. Yes, sir.

Q. How long had you been a member of the crew of the Bear?

A. Oh, that was my first night.

Q. That was your first night? A. Yes, sir.

Q. How long have you fished in the waters off of California for sardines? A. Since 1920.

Q. You have fished here every year?

A. I no fish for two years before that. I no fish '27 and '28.

Q. Aside from those years, you fished every year out of San Pedro? A. Yes.

Q. And you fished for sardines?

A. Yes. Pedro and Monterey. I was fishing 1925 in [176] San Diego, and so on.

Q. Where were you on the Bear just before the accident occurred?

A. I was in the top of pilot house on the long box and right close to mast.

Q. Were you on the starboard side or the port side? A. On the starboard side.

Q. How long had you been up there on top of the pilot house?

A. Oh, about close to one hour.



(Testimony of John Kaiza.)

Q. Where was the Marsha Ann the first time you saw it? A. He was more right.

Mr. Fall: May I have that?

A. He was more right.

Q. About how far away was it when you first saw it?

A. Oh, it was very thick fog and I was thinking a steamer come. Was very thick fog and he was very close.

Q. But how many feet away was the Marsha Ann when you first saw it.

A. Oh, about this distance from one corner to other.

Q. About from one corner to the other?

A. Yes. About around 50 to 60 feet from us, something like that.

Q. What portion of the Bear did the Marsha Ann strike? [177] A. What was that?

Mr. Fall: Mr. Reporter, would you read the question?

Mr. Callaway: Of course, that assumes a fact not in evidence.

The Court: Overruled.

Mr. Fall: I will withdraw the question.

Q. Was there a collision?

A. Where he hit us?

Q. Yes. Was there a collision?

A. I don't understand.

The Court: Did the boats come together?

The Witness: When the boats come together he come on the right side.

(Testimony of John Kaiza.)

Q. (By Mr. Fall): What part of the Marsha Ann came together with the Bear?

A. It comes this way. That is what you mean?

Q. That is correct. Now, your left hand is what boat?

A. On the right side.

Q. You say "come this way"?

A. Yes, in the right side.

Q. Just a minute, now.

The Court: Put your hands back there.

Q. (By Mr. Fall): Which is the Bear? Now, which hand? You have two hands.

A. This is the Bear on the pilot house—— [178]

Q. Just a minute. Will you listen to my question? You have two hands there. Which hand are you using to show the Bear?

A. This one.

Q. That is your left hand?

A. Yes, the left hand.

Q. Your right hand is the Marsha Ann?

A. Yes.

Q. Will you show us with your hands how they came together?

A. This way.

Q. That is indicating the left hand?

A. Like this.

The Court: The witness is demonstrating that the Marsha Ann struck the Bear at an angle. About what angle would that be?

Mr. Callaway: It is less than a right angle.

Mr. Fall: 80 degrees?

Mr. Shallenberger: I don't know.

Mr. Fall: Just something a little less than a right angle.

(Testimony of John Kaiza.)

Mr. Callaway: Yes.

Q. (By Mr. Fall): At that time how fast was the Bear proceeding?

A. The Bear was—we just kicking once in a while [179] and stop.

Q. How fast was it going?

A. Oh, maybe a mile, a mile and a quarter, something like that.

Q. Did you have an opportunity to judge how fast the Marsha Ann was going?

A. No. He was going, but I saw the fume. When he was very close to us I saw the fume of the boat from the bow.

Q. You said you said you saw the “fume.” What do you mean?

A. When the boat go through the water, then he push water.

Q. Oh, you mean the foam? A. Foam, yes.

Q. What color was that foam?

A. White, naturally.

Q. Do you know approximately how long it was between the first time you saw the Marsha Ann and the time it hit the starboard side of the Bear?

A. Oh, that was very, very—it couldn't be 10 length. It was quick, quick hit and good-bye, you know. That was very fast.

Q. But are you able to tell us in seconds, approximately, if you can? If you can't, why, tell us.

Mr. Callaway: You mean from the time he first sighted [180] the Marsha Ann up to the point of impact?

(Testimony of John Kaiza.)

Mr. Fall: Until it struck the Bear, yes.

A. Yes, that was in very few seconds, you know, when the boat was move, going four or five or six miles. I don't know about how much speed he made, but he come very close. It was thick fog and that was in very—in maybe a minute, two minutes. ....

Q. Did you hear any fog horns from the direction that the Marsha Ann came?

Mr. Callaway: Well, that is leading.

A. When the bow was sliding——

Mr. Callaway: Just a minute.

The Court: Objection sustained.

Mr. Fall: Let me finish the question.

Mr. Callaway: Well, I thought you had, but even if you had not, it is still leading and suggestive.

Mr. Fall: I don't think so. I am directing his attention to a specific thing, whether or not in that direction he heard any foghorn.

The Court: Reframe the question. I have sustained the objection.

Mr. Fall: All right.

Q. Did you hear any horns, foghorns from other boats immediately within a minute or so before the collision?

A. Yes. It was on the bow, left side and back of us [181] and to sea, but, to tell you the truth, I no see many of them. I know heard any on the right side.

Q. Within two minutes before the——

The Court: Mr. Fall, if you will be some little

(Testimony of John Kaiza.)

time with this witness—do you want to cross-examine?

Mr. Fall: Yes, your Honor, I will be.

The Court: We agreed to adjourn at 4:00 out of consideration for Mr. Shallenberger's bad health.

Mr. Fall: Yes.

The Court: We will go over until Tuesday morning. What time do you want to start?

Mr. Fall: Whatever time you want.

(Discussion as to probable duration of trial omitted from transcript.)

The Court: We will start at 9:30 Tuesday morning. Maybe we will start back at 1:30 and we might go on until 4:00, 5:00, 6:00 or 7:00. We will get a good day's work in Tuesday. We will have a week-end recess.

(Whereupon, an adjournment was taken until 9:30 o'clock a.m., Tuesday, December 13, 1949.) [182]

Tuesday, December 13, 1949, 9:30 A.M.

The Court: Call the case on trial.

The Clerk: 8960-C, Joseph Ancich, et al. v. D/S "Marsha Ann," et al.

Mr. Shallenberger: Ready.

The Court: Have you gentlemen found any further authorities over the week-end?

Mr. Shallenberger: No.

The Court: Mr. Fall or Mr. Roethke?



Mr. Fall: We didn't find any new ones.

The Court: We have done quite a little work on some of these cases.

First of all, it is clear that the lay arrangement, whereby fisherman participate in the proceeds of a fishing venture, are equivalent to wages.

Secondly, I think it is clear that the master or the owner might sue in behalf of the seamen, for any damage to the boat, any loss in profits in the venture, which in turn the master or the owner would be required to pay over to the seamen. The *Menominee*, 125 Fed. 530, seems to so hold, and other cases.

The question remains as to whether or not the seamen themselves can file a libel for their share of the profits of the fishing venture. In *The Columbia*, Federal case No. [184] 3035, it is a little difficult to tell just what the libel there was. The case is entitled "*The Columbia*" but was an action brought to recover damages for the loss of the seine. Is that it, the seine?

Mr. Roethke: That is right.

The Court: The net, I take it. Then it states exceptions were taken to the report of the Commissioner allowing seamen the libel for their share, one-sixth of the catch, estimated, and were overruled. And whether the seamen were sole libelants or intervening libelants, or what their situation was there, is hard to tell from the case.

Of course, the case in 171 Fed. 2d, where Judge Denman held seamen might maintain their action

independently, the facts in that case showed that both vessels were owned by the same owner, and the judge placed the decision, as I read it, upon the basis that the owner could not sue himself, or a master, as agent of the owner, would be in substance suing himself, so he couldn't bring it directly.

Then there was the case of Walkman, and I believe that should be considered in connection with the problem.

Now, it seems to me that the thing boils down to this problem: Assuming that the owner or the master could have brought a libel and didn't, the first question is, may the seamen maintain the action?

No. 2, if the master should have brought it in the first [185] instance, can it be argued that, by the failure of the master or the owner to bring the proceeding, the seamen therefore became entitled to bring it?

The next question would be, assuming for argument only that the seaman weren't entitled to bring the libel, and that therefore there was really no jurisdiction when the action was commenced, is the intervening libel a good libel, or does it hinge upon an action which has a defective jurisdiction in it? I can't find anything on that. You understand what I am talking about, though?

Mr. Shallenberger: Yes.

Mr. Fall: Yes.

The Court: The same as if they had a cause of action started in which there was no jurisdiction, and an intervening libel is filed which, if originally

filed, unquestionably would have been a good libel, does it fail because the original libel failed?

Finally, since these admiralty cases are to be adjudged on questions of equity and very broad principles are involved, supposing the owner presently filed the new libel in which he sued for the collision and also for the claim of the seamen, and that libel was then consolidated for the purpose of trial with the proceedings thereon, would or would not that cure any problem that might arise? That raises the question of the statute of limitations, I suppose. [186] There has been no petition on limitation filed in this case, has there?

Mr. Callaway: I don't know of any statute of limitation that is applicable.

Mr. Shallenberger: If the court please, I think the court is talking about two things. The petition of limitation would be to limit the value of the vessel. The statute of limitations——

The Court: No, there is another thing I am talking about. I only know what I read in these cases. They tell me that under Rule 36 the law provides that the owner of the vessel might file within six months after the collision a petition to limit not the liability, but to limit the bringing of the action. And if the petition was filed within the six months period——

Mr. Shallenberger: That is in connection with liability. I think the court will find, as it peruses the question, that that limitation is not a limitation upon bringing the action, but is a limitation upon

bringing an action where the ship owner petitions to limit his liability to the value of the ship.

The Court: Maybe you are right. However, as Mr. Callaway says, we may not find any statutes of limitation that are applicable. I think there are some two-year statutes. [187]

Mr. Shallenberger: Two years ordinarily is used as the general period after which courts in this district will declare laches if it is not brought.

The Court: Yes. I ran onto the rule that if the case is stale the court will refuse to entertain it.

Mr. Shallenberger: If the court has any question about the other matter you spoke about, I had occasion to research that quite thoroughly about a year ago and I would be glad to supply the authorities. I don't have them with me this morning, but will be glad to supply them to show that particular limitation is in connection with the owner's petition to limit liability.

The Court: On that last point, namely, would the filing of a new libel by the owner, prepared for himself and for the seamen, consolidated in this action, would that cure any problem that might arise?

Then there might be a final point to think about, and that is—maybe this is the time to see what the courts will say about this. In other words, my present view is to see, if there is any way to do it legally, that these seamen have a right to sue, that these fishermen have a right to sue; but there might well be some appeal on that, and if it is a question



that you can't find authority on, you might get an answer to some of your problems by that sort of proceeding. [188]

That is what I am thinking about.

Mr. Fall: Isn't this the answer to that last point: It is the respondents' contention that there is at least mutual fault. Therefore, if the court would find there was mutual fault, would the owners of the Bear then have been obliged to represent the seamen in a case against the Marsha Ann and itself? That is a point that the court is going to determine, whether or not there is a mutual fault; and why should the owner be placed in the position of handling the rights of the third parties, by either suing or not suing himself?

The Court: In other words, to go a step farther, the owners of the Bear, on that theory, would be in an inconsistent position to a certain extent?

Mr. Fall: A very inconsistent position, because if they elect to sue only the Marsha Ann, and the court would find mutual fault, then the owners of the Marsha Ann would be entitled to recover one-half the liability they might have to pay out to the seamen, from the owners of the Bear. So we need mutual assistance to place the men only in the position of having their owners represent them.

The Court: Well, I just didn't think we would have a long argument this morning, but I wanted to know if you found any new authorities, and I wanted to tell you what I was thinking about. [189]

Has anyone anything else to add?



Mr. Shallenberger: No:

The Court: Let's go ahead.

Mr. Fall: John Kaiza.

### JOHN KAIZA

one of the libelants herein, called as a witness by the libelants, having been previously sworn, was examined and testified further as follows:

Mr. Fall: I don't recall how far we did get on the direct. I don't have notes. I will have to ask the judge for assistance on that.

The Court: I will summarize what notes I have.

He was a member of the crew on 11/30/48. It was his first night out with the Bear. He has been a fisherman in Southern California since 1920; was on top of the pilothouse, the starboard side, up there for an hour; thick fog, could see 50 to 60 feet; and then the Bear was traveling a mile per hour to a mile and a quarter an hour, with a kicking in and out.

He saw foam on the front of the Marsha Ann. Can't estimate its speed. Indicated with his hands the direction of impact, which was not exactly at right angles, indicating the Marsha Ann came in a little bit from the front. He stated he saw the Marsha Ann, and "quick hit and goodbye," [190] something like that, a very few seconds, and he said the Marsha Ann was going four, or five, or six miles an hour.

Mr. Shallenberger: With relation to his position, I believe he said he was on the aft end of the pilothouse.

(Testimony of John Kaiza.)

Direct Examination

(Continued)

By Mr. Fall:

Q. Is that correct? Were you on the after end of the roof? A. On the pilothouse.

The Court: Near mast on the starboard side; that is what he said.

The Witness: Near mast. It was on the right side.

Q. (By Mr. Fall): It was on the right side, but it was on the after side also, was it not?

A. Yes, on that side (indicating).

Q. Pardon? A. On the right side.

Q. Listen to my question. The mast was located just aft of the pilothouse, was it not? A. Yes.

Q. And you were on the after side of the pilothouse, as well as the right side?

A. Holding myself on the gear.

Q. Holding yourself on the rigging?

A. On the rigging, yes. [191]

Q. That is the ladders that go on the side up to the mast? A. Yes, that is right.

Q. And with reference to the place that you were standing, where did the Marsha Ann strike the Bear?

A. A little bit—well, two or three feet from them steps.

Q. From the rigging?

A. From the rigging is right.

Q. Two or three feet aft or forward?

(Testimony of John Kaiza.)

A. Aft.

Q. Aft of the rigging. Now, did you hear any blast from a horn, within two minutes before the accident, from the direction the Marsha Ann appeared?

A. No.

Mr. Callaway: I object to that as leading and suggesting the answer. He can ask him what he heard, but I don't think he can direct him to an answer what could obviously be answered "Yes" or "No." It is leading.

The Court: I don't think it suggests either a "Yes" or "No" answer, so therefore it wouldn't be a leading question. Overruled.

Mr. Fall: Will you read the question?

(The record was read.)

Q. (By Mr. Fall): Had Mr. Miskulin been sounding the [192] horn on the Bear prior to the accident?

Mr. Callaway: I object to that as leading and suggestive.

The Court: What does it suggest?

Mr. Callaway: He tells him what Mr. Miskulin is doing, and asks him to give a "Yes" or "No" answer on it. He suggests the fact that he had been sounding a horn.

If the question said, "What was Mr. Miskulin doing," then he doesn't suggest the answer. The witness is then testifying, rather than counsel. In other words, it suggests an answer, what counsel

(Testimony of John Kaiza.)

wants the witness to testify as to what Mr. Miskulin was doing.

Mr. Fall: I don't agree with Mr. Callaway that the question asks for a "Yes" or "No" answer. It isn't suggestive in any way.

The Court: It can be framed so nobody objects.

Mr. Fall: All right.

The Court: I have been through all this. For instance, one of the things you can do is say to the witness, directing your attention to a certain thing, then ask a question. Certainly a question directing his attention to a matter is not a leading question.

Mr. Fall: I will rephrase the question.

Q. (By Mr. Fall): Where was Mr. Miskulin just before the accident happened? [193]

A. Hold that whistle blow.

Q. What was he doing? A. Blowing it.

Q. Blowing the horn or whistle on the Bear?

A. Yes, blowing horn.

Q. All right. Did you obtain any employment, any work for which you received pay, between the 30th day of November, 1948, and the middle of February of 1949? A. No.

Q. Did you look for it?

A. I was looking for it, but——

Q. What did you do in looking for work?

A. I was in the water wharf one place to other, one work to other; but you people not realize how hard it is to find work when you lose one.

Mr. Fall: You may cross-examine.

(Testimony of John Kaiza.)

**Cross-Examination**

By Mr. Callaway:

Q. Did you, at any previous time, ever pilot a boat such as the Bear?

A. Well, once for short time.

Q. I am not talking about, Mr. Kaiza, on this particular voyage. I mean are you familiar with the operation of boats the size of the Bear? Can you be a helmsman? Can you steer it, run it? [194]

A. Sure, I steer boats.

Q. And you say on this particular voyage you were at the wheel of the Bear, running it, for a time?

A. Yes, I was, just that one night. That was first my night on that boat.

Q. Now, going at one to one and a quarter miles per hour, you can stop that boat, by reversing your engines, practically immediately, can you not?

Mr. Shallenberger: Just a moment.

Mr. Fall: Just a minute. I object, as asking for a conclusion, and not proper foundation laid; certainly not proper cross-examination.

Mr. Shallenberger: Beyond the scope of the direct.

The Court: Well, I don't know that this man has qualified himself to be anything but a fisherman.

Mr. Callaway: Well, if the court feels that I should, I will show his knowledge further.

Mr. Fall: That isn't within the scope of the direct. On the direct of this witness I certainly



(Testimony of John Kaiza.)

didn't show that he had navigated the boat, or any——

The Court: I don't have any notes that you asked him that. Was this the man that took the wheel a short time?

Mr. Shallenberger: No, that was Mr. Milosevich.

The Court: Did you take the wheel of the Bear that night, at the helm? [195]

The Witness: Yes, at the steering, relieving, me and Miskulin.

The Court: For how long?

The Witness: Oh, for a short time, 40 or 50 minutes.

The Court: Well, we are trying this without a jury. The objection is overruled. Cross-examine and see what you can find out.

Read the question that was objected to.

(The question was read by the reporter.)

Mr. Fall: If you know.

The Witness: I don't know if you can——

Q. (By Mr. Callaway): What is that?

A. I don't know if you can stop so quick. I don't know.

Q. Tell me, you have been piloting boats like this many years, haven't you?

A. You see, when we enter in the port, the skipper of the boat maneuver the boat.

Q. Now, in how many feet do you think you could have stopped the boat, at one to one and one-fourth miles an hour?

A. Oh, if boat not go very fast, I think in about

(Testimony of John Kaiza.)

50, 60 feet, if the men back up full speed. But if the men go headway, it take a longer time.

Q. How long had it been that Mr. Milosevich had been at the wheel before the collision? [196]

A. Beg pardon.

Q. Well, as I understand it, Mr. Milosevich relieved Mr. Miskulin?

A. Yes. We call him when the fog start.

Q. Well, how long had he been at the wheel?

A. Oh, maybe 40, 50 minutes. When the fog start.

Q. Now, was there anybody in the crow's-nest up here (indicating)? A. No.

Q. You had a crow's-nest on the boat?

A. No on that boat.

Q. You didn't have any? A. No was that.

Q. What? A. No.

Q. No crow's-nest? A. No.

Q. How did you look for fish?

Mr. Fall: To which we object, incompetent, irrelevant and immaterial to any issue before the court.

The Court: Objection overruled. Go ahead.

Mr. Callaway: You may answer.

The Court: Read the question, Miss Reporter.

(The question was read by the reporter.)

The Witness: If we not have that top there, we look from [197] the bow, one mens in the bow, one mens at the boatside, and everything looks for fish all the time no matter where he is.

(Testimony of John Kaiza.)

Q. (By Mr. Callaway): Now, what part of the Marsha Ann did you see first?

A. Oh, about 50, 60 feet from us.

Q. What part of the boat?

A. On the right side.

Q. On the starboard side? A. Yes.

The Court: You mean you saw her on the starboard side?

The Witness: Yes, on the right side.

The Court: Which part of her did you see first?

The Witness: We was going like this (indicating), and it goes this way (indicating).

The Court: When you saw the Marsha Ann?

The Witness: Yes.

The Court: What part of her did you see first, the side——

The Witness: The side.

The Court: ——or top, or bow?

The Witness: The side. I see his bow.

Q. (By Mr. Callaway): At that time did you see the foam, the white foam that the bow was making? A. Yes, sir; yes, sir.

Q. I take it, Mr. Kaiza, you couldn't see the whole [198] boat at the same time?

A. No, just the bow.

Q. You had no trouble distinguishing the foam that the bow was kicking up?

A. No. It was very close to us, and two or three guy was in the pilothouse by the skipper.

Q. How long had it been since you had heard

(Testimony of John Kaiza.)

a signal, a whistle signal, from any boat other than your own?

A. Oh, it was quite a bit long time. When the fog started, I think then a boat come in from Santa Monica, and their boat was on the right side.

Q. My question is, how long had it been since you had heard a signal from any boat other than the boat you were on?

A. On the bow first was lot of whistle.

Q. Off your bow, then, you heard numerous whistles? A. Yes.

Q. And how long had it been since you heard the last one before the collision?

A. It was—there was blowing.

Q. Blowing all the time?

A. Yes, blowing whistle, boom, boom, boom, from one side to the other, from the bow. Both was going in the port.

Q. I see. What kind of whistle signal was Mr. Miskulin [199] making?

A. He was answering to the other boats. You got to answer the boats close, "Boom, boom," to each other. That is the way they learn how far they are from each other.

Q. In other words, every time he would hear a whistle he would—— A. He answer.

Q. He would make one such as you have indicated, "Boom, boom, boom," is that right?

A. That is right. He answer it.

Q. Do you mean to indicate now that he made

(Testimony of John Kaiza.)

three short whistles, such as your testimony would indicate?

A. There was blowing to the answer of them other boats.

Q. I understand that.

A. No, I don't know if it is three or four. I know there is 50 or 60 of them.

The Court: What kind of whistle did Mr. Miskulin make? Can you show us here what kind, and how long?

The Witness: When we heard, long distance from us, long whistle, long blast, then we give long blast: When we heard smaller, we give smaller. That means we close to each other.

The Court: Did each of these whistles that Mr. Miskulin gave have one blast, or two blasts, or three, each separate whistle? [200]

The Witness: Like I says, sir, when boats close, then we give just one little shot, and we know each other where we are. But the boat master who give the longer whistle, you know he is gone, and you pull a long one again.

Mr. Callaway: I didn't hear the answer. Will you read it?

(The answer was read by the reporter.)

The Court: Is that the practice, in this fog, to answer the whistle by the same kind of whistle you hear?

Mr. Callaway: No.

Mr. Shallenberger: I think it is possible, among



(Testimony of John Kaiza.)

the fishermen. There is nothing in the rules that they shall.

The Court: There is nothing you gentlemen can agree to on that?

Mr. Callaway: I agree that we have already agreed on the stipulation which we prepared and filed with you, that the International Rules apply and the signals required under those rules.

The Court: I am inquiring on this one thing. If there is no agreement on it, we will pass it. I was just wondering whether there was a practice.

In other words, if you hear a bunch of foghorns around you in a fog, and hear a fellow off in the distance give you a long blast, do you answer about the same size of blast so he knows you heard him? And if you hear a short one, you [201] reply with a short one?

Mr. Callaway: I am not familiar with any such custom.

The Court: Let's go ahead.

Q. (By Mr. Callaway): Now, when these boats came together after the collision did they separate?

A. When he hit us,——

Q. Bounce off?

A. When he hit us, then he push three minutes, three to four minutes, toward boat. He push this way (indicating).

The Court: The witness is indicating that after the collision the impact of the Marsha Ann pushed the Bear sideways.

(Testimony of John Kaiza.)

Mr. Shallenberger: From starboard to port.

The Court: From starboard to port.

Q. (By Mr. Callaway): For how long?

A. Three to four minutes.

Q. What were you doing in that three to four-minute interval?

A. I was watching for myself, to save myself.

Q. Did you get aboard the *Marsha Ann*?

A. Yes. After the boats was pushing, then they came on together like this, you see (indicating); and then the tide took both boats.

Q. Now, do you mean, Mr. Kaiza, that the boats occupied a position almost at right angles to where the *Bear* was going [202] propelled sideways in the water and the *Marsha Ann* straight ahead, for three or four minutes, or do you mean they were at one time in that position but in three or four minutes they were side by side?

A. That is the way they were, sir, when they hit——

Q. Do you understand my question? I don't want to confuse you. Do you understand my question?

A. What I see is what I know. When he hit us we was go that way, then in that period of the time the boat came this way (indicating).

The Court: The witness has indicated with his hands that at the end of the sideward pushing of the *Bear*, the two boats ended up side by side, with

(Testimony of John Kaiza.)

the bow of the Marsha Ann back and aft of the bow of the Bear.

Q. (By Mr. Callaway): My question is, did all that take three or four minutes, or was it three or four minutes that you were traveling, you might say, sideways? Do you understand my question?

A. You say how——

Q. No. Think just a little.

A. He was push and swinging along, and the boats come in this way (indicating), both together. That is all I can answer.

Q. My question is very simple. Listen——

The Court: Read the question. [203]

(The question was read by the reporter.)

The Witness: I understand now what the gentleman means. It was taking that much time. Then when the boats swing over together, it was taking more time, when we tied up line, and one thing and another. That is all I see.

Q. (By Mr. Callaway): I still don't understand what you were doing at the end of the three or four-minute period.

A. I was just watching.

Q. I know you were just watching.

A. I was watching at the top. I was at the top, and I was scared to go down on the deck. That is all what I was doing. I was scared to go on the upper deck.

Q. Well, I will try again, Mr. Kaiza. Did it take three or four minutes for your boat to travel sideways and the Marsha Ann straight ahead, and then

(Testimony of John Kaiza.)

come around where they were together, the bow of the Bear being ahead of the Marsha Ann, or did it take—— A. We——

Q. Wait, let me finish. ——or were you traveling sideways during that entire three or four-minute period?

A. Three or four minutes we was going this way (indicating).

Q. You mean sideways? A. Sideways.

Q. That is all I want. [204]

A. Then a longer time before we came alongside of each other.

Q. I see. How long were you there before you commenced traveling to San Pedro?

A. I couldn't tell you that exactly.

Q. Did you get aboard the Marsha Ann?

A. Yes, sir.

Q. When?

A. Oh, when the tide took the boat. When she did, when the tide took the boat over together, then I jumped in my boat and was trying to save my clothes. I was thinking the boat going to sink.

Q. During the period of time after you first sighted the Marsha Ann, how far forward did the Bear travel before the collision?

A. How much we was going?

Q. How many feet did you go forward before the collision?

A. Oh, maybe 10, 15 minute, something like that.

(Testimony of John Kaiza.)

Q. Did the direction in which your bow was headed change any during that time?

A. I don't understand.

Q. Well, did your skipper turn to pull away from the Marsha Ann?

A. I couldn't tell you that, because I was looking on [205] the boat. I couldn't say anything like that, what he was doing, because I was looking on the boat. It was awful danger, in the fog.

Q. Did you stay in relatively the same position——

A. Yes.

Q. ——near the mast?

A. Yes, hold myself one of the gears.

Q. You stood right there?

A. Yes, I stood right there until went to tie up the line.

Q. And you didn't move from one side of the boat to the other?

A. No.

Q. Well, I take it, Mr. Kaiza, that when you first saw the Bear you thought she was going to strike your boat just about where you——

A. No, he was a little bit over the blue light, going a little further from the mast. I was thinking he going to hit about the blue light.

Q. By "the blue light," do you mean the side light?

A. Yes, the side light, that is right.

Q. What did you mean in your direct testimony, Mr. Kaiza, when you said, "It was quick hit and goodbye"?

A. Yes, when he come on us, I said, "Goodbye now, we gone." That is what—— [206]



(Testimony of John Kaiza.)

Q. In other words, you thought it was all over?

A. Yes, that is all. It was danger, to save the life. That is why I said, "Goodbye," to myself.

Mr. Callaway: That is all.

Redirect Examination

By Mr. Fall:

Q. Mr. Kaiza, was there anyone on the bow of the Marsha Ann when you first saw it?

A. No. I show there how I was, and two or three guy was in the pilothouse. No one in the bow.

Q. Did you have any other duties other than a lookout at the time of the collision?

A. No, I no got any duty. I was watching for boats; I got no other duties.

Q. Was that all you had to do?

A. That is all.

Q. Did you ever try to stop the Bear at any time? A. No.

Q. Whether it was at one mile an hour or six or eight miles an hour?

A. No, never tried to stop the Bear. I never stop—that was my first night.

Q. You never did? A. I never did.

Mr. Fall: I have no further questions. [207]

The Court: You may step down.

Mr. Fall: Mr. Ancich.

The Court: Ancich, the cook?

Mr. Fall: Yes.

## JOSEPH ANCICH

one of the libelants herein, called as a witness by and on behalf of the libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Ancich.

The Clerk: What is your full name?

The Witness: Joe Ancich.

## Direct Examination

By Mr. Fall:

Q. Is that Joseph?

A. Well, Joe and Joseph.

Q. Mr. Ancich, were you a member of the crew of the Bear on November 30, 1948?

A. Yes, I did.

Q. And what was your position?

A. I was cook there.

Q. And how long had you been a member of the crew there?

A. I was there about, I think, couple of weeks, I guess, [208] all together.

Q. And do you recall the accident that occurred on the morning of November 30, 1948?

A. That is right.

Q. Where were you on board the Bear at the time of the collision?

A. Well, I was in the pilothouse, the bridge; what we call a pilothouse.

Q. On top?

A. Yes, close to icebox.

(Testimony of Joseph Ancich.)

Q. Did you see the Marsha Ann before the collision?

A. Yes, I did. I just happen to come up and saw it.

Q. You just happened to come up, and saw it?

A. Yes.

Q. And the ladder coming up to the top of the pilothouse, was that on the after side of the pilothouse?

A. That is on the left side.

Q. The port side?

A. I don't know. I call it left side.

Q. How long had you been up on top of the pilothouse before you saw the Marsha Ann?

A. I just come up there, I just come up when it happened; about 20 seconds after it happen.

Q. About how far away was the Marsha Ann at the time you first saw it? [209]

A. Well, when I come up, I look north, and I see Marsha Ann, see. I don't know if I pronounce the right name or not. I saw coming this way,—I don't think they going to back up. I don't know why they don't back up. That is all I see.

Q. About how far from the Bear was the Marsha Ann when you first saw it?

A. That was, I think, about 40 or 50 feet, I think.

Q. Did it change its course at any time between the time you first saw it and the time of the collision?

A. What you mean "they"?

Q. The Marsha Ann.

(Testimony of Joseph Ancich.)

A. No, they come right straight ahead.

Q. And about how fast was the Bear going at the time, if you know?

A. Well, I don't keep much track of it, because I was a cook, you know; but I think that we stand still, see.

Q. So what happened to the Bear immediately after the collision?

A. Well, I went down there, and I see that we was pushing, you see, maybe for about 10 or 15 or 20 seconds, I am not sure, and the Marsha Ann down there, maybe 4 or 5 minutes, I don't know, maybe more, I am not sure. Then I went inside the galley, and that is all I can say.

Q. Do you know whether the running lights or mast lights [210] on the Marsha Ann were burning at the time you first saw it?

A. Well, I see no light.

Q. Did you see anyone on the bow of the Marsha Ann at any time between the time you first saw it and the time of the collision?

A. You mean if I see anybody on the Marsha Ann?

Q. On the bow.

A. Any man? Yes, I see the skipper and some other guy on the top of the pilothouse. That is all I saw.

Q. I am talking about the bow.

A. No, I don't see anybody on the bow.

Q. Were you employed at any time between the 30th of November and the 15th day of—

(Testimony of Joseph Ancich.)

A. No, I wasn't.

Q. —February? I am talking about November 30 of 1948 and February 15 of 1949.

A. No. I just was first of July on Cortez Washington.

Q. What did you do with reference to trying to get employment between November 30 of 1948 and February 15 of 1949?

A. I was looking for job Canada C.I.A. workers, but I shipyards and cannery, and I like to go fishing, and try to get a job.

Q. Do you remember Ray Zukowski?

A. You mean that guy that live at Tacoma?

Q. Yes. A. Yes, I know him.

Q. Did he accompany you at any time on these attempts to seek employment?

A. Well, I used to go down to the call at Kello, down to 6. I saw him there every once in a while, a day, and he ask me once couple of dollars. I don't know I give him any money.

Q. Do you know whether or not he was seeking employment?

A. I don't think he was working.

Q. Did you see him try to get a job?

A. Yes, I see him try to get a job. He was down on slip, and on Terminal Island, trying to get a job. I don't think he have job when I saw him.

Mr. Fall: You may cross-examine.



(Testimony of Joseph Ancich.)

Cross-Examination

By Mr. Callaway:

Q. What was the first thing that attracted your attention to the Marsha Ann?

A. I don't understand you.

Q. What was the first thing that attracted your attention to the Marsha Ann?

A. You mean what I saw?

Q. Yes, was there anything that attracted your attention [212] to her?

A. When I was in pilothouse, all I see coming is Marsha Ann, that is all I saw.

Q. What caused you to look in that direction?

A. It happened I look that way, because whistle all over, and we whistle, and there was danger there.

Q. You think it was the whistle signal that you heard that made you look that way?

A. Yes, but it was too fog. There was rest of them whistles all over on the side. And we whistle steady. That is all I know. When I was in the galley I——

Q. I am not talking about while you were inside; I am talking about after you got on top of the pilothouse.

A. I know we are whistling, that is all I heard; and I heard a few whistle answers, way too far.

Q. What caused you to look up when you saw the Marsha Ann?

A. It just happened I came up from the pilot-

(Testimony of Joseph Ancich.)

house to get some tomatoes, and happened to see, that is all.

Q. Did you hear anybody on your ship say anything to the skipper or the helmsman about the presence of a boat approaching off your starboard?

A. I never heard anything.

Q. In other words, you didn't hear any of your men say, "Look out, here comes a boat," or anything like that?

A. No. [213]

Q. What?

A. No.

Q. How long was it, Mr. Ancich, between the time that you first sighted the Marsha Ann and the actual impact? Do you understand my question?

A. Well, one way I understand, an another one——

Q. I will reframe it. From the time that you first saw the Marsha Ann——

A. Yes.

Q. ——off to your starboard, right up to the time that the two boats hit, how long was it?

A. Oh, that was about 20 seconds, I guess, 20 or 25 seconds.

Q. During that 20 or 25 seconds, did you hear any of the people on your boat say anything to the skipper or the helmsman about the approach of the Marsha Ann?

He shook his head.

A. Just "Stand by there," is all.

Q. How much distance is there between the bridge of the Bear and the bow of the Bear?

Mr. Fall: What part of the bridge?

(Testimony of Joseph Ancich.)

Q. (By Mr. Callaway): Well, I will put it this way: Where were you standing, by the icebox?

A. I can tell you where I stand.

Q. No, how far was it from where you were standing to [214] the bow of the boat?

A. I was standing on top of the bridge there.

Q. I know you were. How far was it from the bow?

A. About—well, I am not carpenter, but I am sure I think about 20 feet at least. I am not sure, I don't want to say.

Q. I understand you think it was about 20 feet, is that right?      A. Yes.

Mr. Fall: Answer audibly. Don't shake your head; the reporter can't get that. What is your answer?

The Witness: Yes.

Q. (By Mr. Callaway): Isn't it true that at the time in question your visibility was limited to about the bow of your ship, by the density of the fog? Do you understand my question?

Mr. Fall: Answer audibly.

The Witness: No.

Q. (By Mr. Callaway): I say, isn't it true that that is about as far as you could see, on account of the density of the fog at that time?

A. Oh, I could see more than that.

Q. How far could you see?

A. It was around 40, 50 feet.

Q. Well, I will ask you this question: After these [215] two boats had had the collision and

(Testimony of Joseph Ancich.)

finally came around into a parallel position, did you see another boat go by the Marsha Ann——

A. I don't see no kind of boat.

Q. ——on the starboard side?

A. I don't see no kind of boat. It happen, I went inside the galley; that is all I know.

Q. This is after the collision was all over; did you see a boat pass within 25 feet?

A. No, no, I don't see no boat.

Q. Now, could you see the bow of the Marsha Ann before you saw the pilothouse, or at the same time, or what?

A. Well, I don't look in the pilothouse. I look this way (indicating), when I look out.

Q. Well, the Marsha Ann is coming directly toward you, isn't it?

A. Come this way (indicating).

Q. Right directly at you?           A. Yes.

Q. Did you see the bow and the pilothouse at the same time?           A. Ours?

Q. No, the Marsha Ann.

A. Yes, I saw captain and another fellow, on the pilothouse. [216]

Q. When you first saw the Marsha Ann?

A. Yes, the captain and another man.

Q. You saw the captain and another man?

A. Yes, through the fog.

Mr. Callaway: That is all.

Mr. Fall: I have no further questions.

(Witness excused.)

Mr. Roethke: I call Mr. Bogdanovich.

## ANTON BOGDANOVICH

called as a witness by and on behalf of the intervening libellants, having been first duly sworn, was examined and testified as follows:

The Clerk: The first name is A-n-t-o-n?

The Witness: A-n-t-o-n, yes.

## Direct Examination

By Mr. Roethke:

Q. Mr. Bogdanovich, how do you make your living? A. Fishing.

Q. How long have you been a fisherman?

A. Well, I started first on this port since 1927; that is, this port, Los Angeles port.

Q. How long have you been a fisherman?

A. Ever since I came in this country in 1912.

Q. Now, were you ever employed aboard the fishing boat [217] the Bear?

A. No, just that was my first night out.

Q. I say were you ever employed on it?

A. No.

Q. You never worked on the Bear at all?

A. No, just that night when I went out first.

Q. Mr. Bogdanovich, will you pay attention to the question? A. Yes.

Q. When did you start working on the Bear?

A. I start working on the Bear maybe a day before we went out.

Q. That would be the 28th or 29th of November, 1948? A. Just about that.



(Testimony of Anton Bogdanovich.)

Q. And you were a member of the crew, were you, of the Bear on the 30th of November, 1948?

A. Yes, sir.

Q. Had you gone out fishing the night before, on the Bear?      A. Yes, sir.

Q. Now, on the morning of the 30th, about 9:30, where was the Bear, if you remember?

A. I don't remember where was the Bear, because I was—I think I must be sleeping, because I wasn't on deck at all. [218]

Q. When did you come on deck on the morning of the 30th, Mr. Bogdanovich?

A. Well, I come on deck around about, it must be around about quarter to eleven.

Q. About a quarter to eleven. Where was the Bear at that time, Mr. Bogdanovich?

A. Well, the Bear must be at that time around some place past Newport, around there, Huntington Beach, whatever they call it.

Q. Was it foggy at the time you came topside?

A. When I went topside, it was pretty foggy, yes.

Q. I see. Did you have any duties on the Bear that morning?      A. No.

Q. Did you come topside to do anything?

A. I came up there to my duty, to help look out.

Q. Well, did you have duties, then, as a lookout?

A. Part of it was my own will to go up there on a lookout.

Q. Well, where do you go to look, in a lookout?

(Testimony of Anton Bogdanovich.)

A. I was standing there right under the green light, standing right on the rail.

Q. Does this look something like the Bear looks, Mr. Bogdanovich?      A. Yes. [219]

Q. Now, using this as a model, will you show the court where you were standing on the Bear on the morning of the collision?

A. Yes, I was standing right about here (indicating).

The Court: Indicating the topside, where the pilothouse is on the model, and to the right of the front end of the platform.

Q. (By Mr. Roethke): Let me ask you, was the Bear in a collision with another vessel on the morning of the 30th, Mr. Bogdanovich?

A. What do you mean "collision"?

Q. Well, did you have a collision with another boat on that morning?

A. I don't understand that word "collision."

Q. Well, did the Bear——

The Court: An accident.

The Witness: No.

Q. (By Mr. Roethke): You had no accident that morning?      A. No.

The Court: Did somebody else have an accident?

The Witness: I guess so.

The Court: Did the Bear collide with, or did any other vessel collide with, hit the Bear that morning?

The Witness: The Marsha Ann hit it.

Q. (By Mr. Roethke): Do you know what time

(Testimony of Anton Bogdanovich.)

the Marsha [220] Ann hit the Bear, Mr. Bogdanovich?

A. I should judge it was around about 11:30, something like that.

Q. Had you been standing on the bridge of the Bear, then, for about 45 minutes before the collision with the Marsha Ann? A. Yes, sir.

Q. And during the time you were standing there, what were you doing, Mr. Bogdanovich?

A. When I was standing on top the bridge?

Q. Yes.

A. I just sat there and watched, and when I hear some whistle I report to Mr. Milosevich the direction.

Q. Which way were you looking?

A. I was looking forward. The position I could see both sides and ahead.

Q. You mean to starboard and ahead?

A. Yes.

Q. Mr. Bogdanovich, where was the Marsha Ann when you first saw it?

A. Well, the Marsha Ann, when I first saw her, she was just about 50 feet away from us, 40 to 50 feet, I should judge, that way (indicating).

Q. And which side of the Bear?

A. On the right side. [221]

Q. And what was her heading? What was the Marsha Ann's heading at that time?

A. She was heading right ahead, right toward us when I saw her. She was heading for fishing ground, I guess.

(Testimony of Anton Bogdanovich.)

Q. What part of the Bear was she heading for?

A. The way I was looking, she was going to hit us around the green light, when I saw her.

Q. Where did the Marsha Ann strike the Bear?

A. The Marsha Ann struck about here (indicating).

The Court: Indicating immediately aft of the center.

Q. (By Mr. Roethke): About how far back of the green light would that be?

A. That must be at least 10 feet, 7 or 8 feet, something like that.

Q. Now, when you first saw the Marsha Ann, was there anyone on the bow of the Marsha Ann?

A. No.

Q. Between the time you first saw her and the time that she hit you, did you see anyone come on the bow of the Marsha Ann?

A. No. After the collision——

Q. No, I mean before.                      A. Before, no.

Q. Did you observe the angle at which the Marsha Ann struck the Bear, Mr. Bogdanovich? [222]

A. Well, she struck us right straight broadside.

Q. And after she struck you, what happened to the two vessels?

A. Well, after she struck us, she was pushing the Bear straight broadside.

Q. Were you able to form any estimate of the period of time that the Marsha Ann pushed the Bear broadside?

(Testimony of Anton Bogdanovich.)

A. Well, I would judge at least about four minutes.

Q. Four minutes. After you first sighted the Marsha Ann and to the time of the collision, were you able to form any estimate of the amount of time that elapsed? In other words, how long was it from the time you first saw the Marsha Ann until she struck you?

A. It was only about two seconds.

Q. Were you able to form any estimate of the speed of the Marsha Ann?

A. Oh, yes. I should judge she must travel about six miles anyway.

Q. Did you observe any bow wake on the Marsha Ann?

A. Yes. When she shoving water ahead, you know, the foam of water.

Q. Could you see that on the Marsha Ann's bow?

A. Yes.

Q. What was its color?

A. White. [224]

Q. Did you continue to observe the Marsha Ann from the time you first saw her until the time she struck the Bear?

A. Yes.

Q. Did you notice any change in the Marsha Ann's course?

A. No.

Q. From the time you first saw the Marsha Ann until the time of the collision, did you hear her give any whistle signals, Mr. Bogdanovich?

A. No, I didn't.

Q. Prior to the time the Marsha Ann hit you,



(Testimony of Anton Bogdanovich.)

how long was it before then that you had last heard a whistle signal from your starboard bow?

A. Well, I heard whistles from other boats.

Q. Well, how long was it before the collision that you last heard a whistle signal from the starboard bow of the Bear?

A. Well, the boats, they was blowing steady.

Q. Well, did you hear any whistle signals off the starboard bow of the Bear?

A. No; I heard them on the left side.

Q. Now, was the Bear making any way through the water at the time of the collision?

A. No, we practically stand still.

Q. Practically; were you making any way [224] at all?

A. I should judge, when I say practically stand still, about one mile an hour at most.

Q. When you saw the Marsha Ann coming toward the Bear, did you make any outcry or notify the man at the wheel, of her approach?

A. Well, everybody see it, see her. She is right on top of us. There is not much left to say.

Q. Who had the wheel? A. Milosevich.

Q. Now, did you notice that he observed her as soon as you did, that he observed the Marsha Ann as soon as you had? A. Yes.

Q. During the 45-minute period that you were acting as lookout just preceding the collision, Mr. Bogdanovich, did you have any other duties on the bridge to perform? A. No.

Q. I believe you said that after the collision you

(Testimony of Anton Bogdanovich.)

estimated that the Marsha Ann pushed the Bear sideways for about four minutes?      A. Yes, sir.

Q. Was that pushing it toward the port side of the Bear?

A. She was pushing us straight sideways.

Q. Yes, but it would be toward your port side?

A. Yes. [225]

Q. Now, what did you do immediately following the collision, Mr. Bogdanovich?

A. Well, after the, following the collision, I jumped from the bridge down there to see what the damage looks like, then I jump up on Marsha Ann bow.

Q. Well, was the Marsha Ann still pushing against the side of the Bear at the time you jumped?

A. Well, she had the bow up against the Bear.

Q. She had the bow up against the Bear?

A. Yes.

Mr. Callaway: Just a minute, if I may interrupt.

The Court: This is a good time to take our morning recess.

(A short recess was taken.)

Q. (By Mr. Roethke): Mr. Bogdanovich, following the collision, do I understand you to say that you went aboard the Marsha Ann?      A. Yes.

Q. Was the Marsha Ann still pushing the Bear sideways at the time you went aboard the Marsha Ann?

A. She had her bow up against our boat anyway.

(Testimony of Anton Bogdanovich.)

Q. Do you recall if she was still pushing you or not? A. No, she was staying against the boat.

Q. Staying against it? [226] A. Yes.

Q. After you got aboard the Marsha Ann, did you have any conversation with Mr. Borcich?

A. I heard Mr. Borcich state that he saw us through the radar.

Q. Did he say anything other than that? Did he say for what period of time he had seen you through the radar?

A. I didn't hear any. That is all I heard, just that he seen us through the radar.

Q. Now, after the collision, what happened to the Bear and the Marsha Ann?

A. After the collision, the Marsha Ann came alongside of the Bear and took us alongside, and put a block and tackle on to lift that side where she was crippled so the water don't go in so much.

Q. After she had done that, what happened?

A. Then she tow us to the port.

Q. Where did she take you?

A. To Van Camp Cannery.

Q. When did you leave the Bear, Mr. Bogdanovich?

A. I leave the Bear that night when we put her in the ways.

Q. Did you ever go back to work on the Bear between the 30th of November, 1948, and the 15th of February, 1949? A. No. [227]

Q. Did you make any attempts to obtain any other employment? A. Yes.

(Testimony of Anton Bogdanovich.)

Q. Between November 30, 1948, and February 15, 1949? A. I did.

Q. What attempts did you make?

A. I went, ask several boats for a chance to go fishing, and they promised me, of course, first chance, but I never got one anyway until I think it was around about February.

Q. When did you next go fishing, Mr. Bogdanovich? A. I went to Mexico, or Tiajuana.

Q. When?

A. Well, we left around, I believe it was around first part of April sometime, about that neighborhood.

Q. Do I understand you did no work at all between November 30th and the early part of April?

A. No.

Mr. Roethke: You may cross-examine.

### Cross-Examination

By Mr. Callaway:

Q. You state you were pushed broadside for four minutes. How far did you travel during that four-minute interval?

A. By that you mean the Marsha Ann?

Q. How far did your boat and the Marsha Ann travel during that four-minute interval? [228]

A. Well, I don't know how far she push us, how far she was traveling. She shove us.

Q. How far did she shove you?

A. What is that?

(Testimony of Anton Bogdanovich.)

Q. How far through the water did she shove you?

A. It was pretty fast, because she was laying over with the guy on the water.

Q. But how far, how much distance?

A. I don't know.

Q. You don't have to give it to me in feet. Give it to me in any other convenient measurement, in the boat length of the Marsha Ann, the boat length of the Bear, or anything——

A. She must push us at least, say, about 100 feet.

Q. 100 feet. Now, during that 100 feet, did the bow or stem of the Bear swing in towards the Marsha Ann?           A. No.

Q. Just stayed right straight in front?

A. Yes, sir.

Q. Now, if I understand you correctly, when you first saw the Marsha Ann she was headed directly at the light on the starboard side of the pilothouse, like that (indicating)?

A. No, she was going to hit right square into this (indicating).

Q. In other words, it is your testimony that she was [229] at almost a right angle?

A. Yes.

Q. About like I am holding my hand, is that right?           A. Yes.

Q. By that I mean at one time it was up here (indicating), but the angle was the same back here (indicating)? Do you understand me?



(Testimony of Anton Bogdanovich.)

A. Yes.

Q. Is that right?

A. Well, she hit us right square.

Q. About like I am holding my hands?

A. Yes.

Mr. Callaway: We will stipulate that is about at right angles.

The Court: The record may so show.

Q. (By Mr. Callaway): Now, during that 20 or 30 seconds that elapsed from the time you first saw the Marsha Ann to the time the boats came together, did your boat turn to the port to get away from it?

A. No.

Q. Just kept going straight ahead?

A. She had her bow straight ahead.

Q. How did you get on the bow of the Marsha Ann?

A. I got hold of a cable and jump up.

Q. Did somebody throw you a line? [230]

A. No.

Q. Did you go right over the stem of the boat?

A. Right over the stem. I jump the guards. The guards below; I put my feet on them and reach up there.

Q. How much higher is the bow of the Marsha Ann than the deck of the Bear, approximately?

A. Well, I don't know. The Marsha Ann was pretty high. The Marsha Ann bow pretty high.

Q. Well, can you stand on the deck of the Bear and reach it with your hands extended as far as you can extend them?

(Testimony of Anton Bogdanovich.)

A. Yes, from the deck of the Bear. I jump on the guard first.

Q. The guard rail of the Bear?

A. No, the Marsha Ann guard, from the Bear.

Q. Well, is it your testimony, Mr. Bogdanovich, that every time you heard a boat whistle you reported it to the helmsman?

A. I reported it to Milosevich.

Q. That is what I mean.                   A. Yes.

Q. Well, wasn't he standing right beside you?

A. What is that?

Q. Wasn't he right beside you on an open bridge?

A. No, he was about 5 feet away from me. [231]

Q. The bridge was open?                   A. Yes.

Q. And was he sitting down or standing up?

A. Standing up.

Q. Well, didn't you think that he could hear the same whistles that you heard?

A. I should think that he did.

Q. Well, what was the necessity of your having to tell him every time——

Mr. Fall: I object.

Mr. Callaway: Let me finish my question.

Q. (By Mr. Callaway): What did you think the necessity of telling him was, if you thought that he could hear it?

Mr. Fall: Just a minute; to which I object, on the ground it is argumentative——

The Court: Overruled.

(Testimony of Anton Bogdanovich.)

Mr. Fall: —and asking for a conclusion of the witness.

Mr. Callaway: Read back the question.

(The question was read.)

The Court: Overruled. Just the same, he is asking, "Why did you tell him?"

Mr. Callaway: You may answer.

The Witness: Of course, we do that, sometime he doesn't hear. Maybe I thought he didn't hear the whistles, so I tell him, in cases of that. [232]

Q. (By Mr. Callaway): What prevented him from hearing anything you could hear, with him 5 feet away?

A. I don't know what prevented him. I just asked him, "Did you hear that whistle?" He says, "Yes."

Q. Were any other of the men on the pilothouse reporting to him whistle signals of other boats?

A. I didn't hear no one except just one—what I stated.

Q. Well, you heard a lot of whistle signals in the last 15 minutes before this collision happened, didn't you?      A. Yes.

Q. They were coming from all over?

A. No, they were ahead of us.

Q. Ahead of you?

A. Yes, going same direction we was going.

Q. You heard a lot of them?

A. Quite a few of them.

Q. And you told him every time you heard one?

A. Not every time, no.

(Testimony of Anton Bogdanovich.)

Q. How far could you see on this occasion just before the collision?

A. Well, just like I says. I can see around about 50 feet away from our boat, to the collision, is as far as we can see, about 50, 60 feet, something like that.

Q. Had you seen any other boats immediately prior to [233] this happening, say the last 15 minutes?

A. Before that?

Q. Yes, 15 minutes before, had you seen any other boats?

A. We seen one, what we passed close him. We was, on the way, about 15 feet from one boat. I don't know what boat was it. That is the only boat I seen until this happen.

Q. When you saw the Marsha Ann, was that at the same time you saw the pilot and the other fellow in the pilothouse?

A. What is that?

Q. When you saw the Marsha Ann, at the same time did you see the pilot and the other man in the pilothouse?

A. No, I wasn't paying attention. I just seen the pilothouse and bow, and then it is foggy, you know, I think it is big battleship coming.

Q. Were you able to make out the name of the Marsha Ann on the boat?

A. Yes, when she got close.

Q. How close was it when you could distinguish the name of the vessel?

A. Oh, she must be about 10 feet away from us.

Q. Did your vessel change its speed any during

(Testimony of Anton Bogdanovich.)

the 20 to 25 seconds after you saw the Marsha Ann?

A. No.

Q. It stayed the same? [234] A. Yes.

Mr. Roethke: Counsel, may I interrupt there. Did Mr. Bogdanovich say 20 to 25 seconds? I thought on direct he said two seconds.

Mr. Fall: That is correct.

Mr. Callaway: I am wrong; I am reading my notes on Ancich, I beg your pardon. I am reading the wrong notes.

We will withdraw the question and stipulate the answer may go out.

Q. (By Mr. Callaway): Now, when you came on deck about 10:45, it was very foggy then?

A. When I come on the deck? No, it wasn't very foggy.

Q. When did the fog get heavy?

A. Well, the fog, he got pretty thick around about, oh, about 11:00 o'clock, 11:15, something like that.

Q. Around 11:00. And was that when you stationed yourself on the pilothouse?

A. No, I went in the pilothouse a little bit after 10:00—after 11:00.

Q. When you went on the pilothouse, was Mr. Miskulin at the wheel, or was Milosevich?

A. Milosevich was on the wheel.

Q. When you came on deck, who was on the wheel, Miskulin?

A. When I come on the deck, I can't see up to



(Testimony of Anton Bogdanovich.)

the [235] pilothouse; I don't know who was up there on the wheel.

Q. The first thing you did, if I understand it correctly, Mr. Bogdanovich, was that you went down below to see whether or not you were shipping water?

A. Well, I went down to see whereabouts we are shipped, see whereabouts we ship. Then I went back after that and jump on the——

Q. How long was it after the accident before you boarded the *Marsha Ann*?

A. Well, it was just about—it must be around three minutes at least.

Q. At that time, the two boats were at a standstill?      A. Yes.

Mr. Callaway: That is all.

Mr. Roethke: We have no further questions of Mr. Bogdanovich.

The Court: Step down; you are excused.

(Witness excused.)

Mr. Shallenberger: I call Mr. Sims. [236]

### LOUIS SIMS

called as a witness on behalf of intervening libelants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Louis Sims.

The Clerk: Take the stand.

(Testimony of Louis Sims.)

Direct Examination

By Mr. Shallenberger:

Q. Mr. Sims, what is your occupation?

A. Consulting marine engineer and marine surveyor.

Q. By whom are you employed?

A. P. Banning Young.

Q. And was that your occupation during the month of November, 1948?           A. It was.

Q. And how long have you been working in that capacity, Mr. Sims?

A. Since July of 1947.

Q. And do you hold any marine licenses?

A. Yes.

Q. What license?

A. Unlimited chief engineer.

Q. By "unlimited" you mean not restricted to any ocean or any tonnage?

A. That is right. [237]

Q. And do you hold any other licenses other than that, Mr. Sims?

A. That is the top license I hold.

Q. And do you belong to any professional societies?           A. No, I don't.

Q. Now, Mr. Sims, were you, on or about the 30th day of November, called upon to make a survey of the fishing vessel Bear?           A. I was.

Q. And did you start such a survey upon that date?           A. Yes, sir.

(Testimony of Louis Sims.)

Q. And where was the vessel when you first saw her?

A. She was afloat at the dock of the Van Camp Seafood, Terminal Island.

Q. And at that time, Mr. Sims, did you board her?      A. I did.

Q. And what did you do at that time?

A. Well, when I first went aboard, I contacted the captain to determine as near as possible the nature of his damage.

Q. And what did you do at that time with respect to determining the nature of the damage?

A. Well, of course, the vessel was afloat, and she had on a partial load of fish; and prior to my arrival the skipper had made arrangements and had pumps provided in order [238] to pump her down. She was making water, and her fish hold was practically filled.

There was also water in her engineroom, as a result of her leaking pretty badly.

Q. Now, Mr. Sims, what did you actually do with respect to determining the extent of damage while the vessel was lying there at the Van Camp dock?

A. Well, there wasn't too much that you could do right at that time. The thing that we had to do was to get her unloaded and get her on the ways, get her out of the water; and naturally we looked at the side of it and made what examination we could from topside, and made the arrangement to have her hauled out as soon as possible.

(Testimony of Louis Sims.)

Q. All right; and was she hauled out shortly thereafter?      A. Yes, she was.

Q. All right. When was she hauled out, and where?

A. She was hauled out to Harbor Boat, and I believe it was that same afternoon. I would have to check my records on that.

Q. When did you next see her after you saw her at the Van Camp dock?

A. On the ways at Harbor Boat.

Q. When was that?

A. I believe it was the same afternoon. [239]

Q. And did you at that time commence your detailed survey?      A. That is correct.

Q. Did you also cause pictures to be made of the Bear and of the other vessel, the Marsha Ann?

A. I did.

Q. And were those pictures made under your direction and supervision?      A. They were.

Q. I show you a group of pictures numbered Libelants' Exhibits Nos. 1 through 12, inclusive, and ask you to look at the first picture, Libelants' Exhibit No. 1. Is that one of the pictures which you caused to be made?      A. Yes, sir.

Q. And what is that a picture of?

A. A picture of the damage of the area at the stem of the Marsha Ann.

Q. And I show you Libelants' Exhibit——

I am sorry, your Honor, these are not in order. I thought they were. The exhibit that I showed Mr.

(Testimony of Louis Sims.)

Sims, that he just identified, was Libelants' Exhibit 12, and not Libelants' Exhibit 1.

I will now show you Libelants' Exhibit 1, and ask you if that was one of the pictures that was taken under your direction and supervision, Mr. Sims.

A. Yes, sir.

Q. And will you state what that is a picture of?

A. That is a picture of the damaged area of the guard on the Bear, the starboard main guard.

Q. And from what angle was that picture taken, Mr. Sims?

A. That was taken from the top of the bulwarks, and slightly aft of the damage.

Q. And was it looking down upon the——

A. Yes, looking down.

Q. ——deck and top of the guard rail?

A. That is correct.

Q. I show you Libelants' Exhibit No. 2, Mr. Sims, and ask you to identify that.

A. This is also of the starboard side of the Bear, taken from forward and from the top of the bulwarks, looking down and slightly aft.

Q. And what does that picture show, Mr. Sims?

A. That shows the bulwarks where it has been set in and broken.

Q. And what does this show just below the end of this chain, if anything?

A. In this? Well, it shows another view of the main guard there, where it has been crushed and broken in.

Q. In other words, that is the same main guard



(Testimony of Louis Sims.)

damage [241] as is shown in greater particularity in Libelants' Exhibit No. 1?

A. That is correct.

Q. Showing you Libelants' Exhibit No. 3, will you identify that, Mr. Sims?

A. This is a view of the port side of the vessel, from——

Q. Which vessel?

A. Of the port side of the Bear, showing the extent of the damage to her port side hull planking, and where it had been kicked out by the lower end of the knees in the fish hold.

Q. And that is the port side, I believe you said, of the Bear?      A. That is correct.

Q. And at about what position longitudinally on the boat?

A. This is just slightly aft of midship.

Q. I show you Libelants' Exhibit No. 4, Mr. Sims. Will you identify that?

A. This is taken slightly forward of the damaged area, looking at the inside of the starboard bulwarks of the Bear, where the inner clamp of the bulwarks has been broken loose and——

Q. Will you point out the inner clamp?

A. This timber here (indicating). [242]

Q. The lower of the damaged timbers as shown on the picture?

A. Yes, that is correct.

Q. Will you proceed and identify the other timbers?

(Testimony of Louis Sims.)

A. This is the hardwood cap on top of the bulwark, which you can see——

Q. Indicating the middle member shown of the three timbers?

A. No. This is all one timber.

Q. I see.

A. That is one timber that has been split. This was broken, the lower portion of it has been broken down, and evidently when it was struck the cap rail being forced inward, it split out this inner clamp, and the upper portion remained with the spike and cap rails.

Q. The top of the apparent plank——

A. That is the hardwood cap on the top of the bulwarks.

The Court: How big is this point (indicating)? Is that a 2 by 10?

The Witness: If I remember right, that was a 2 by 10, yes, sir.

The Court: It is a close-up view of it, so it looks like it is bigger.

The Witness: That cap was also a 2 by 10.

The Court: The cap? [243]

The Witness: Yes.

The Court: This couldn't be a 2 by 10 if this here (indicating) was. That looks like about a 4 by 6.

Q. (By Mr. Shallenberger): Is there anything in your report, Mr. Sims, that will show the size of those timbers?

(Testimony of Louis Sims.)

A. I may have put it in. Sometimes we do and sometimes we don't.

Mr. Shallenberger: Well, I think it is important, your Honor. I will ask some questions of Mr. Sims to identify this.

Q. (By Mr. Shallenberger): Mr. Sims, upon making your survey over the period of time in which you surveyed this vessel, did you make notes of what you found?

A. That is right.

Q. And did you later transcribe those notes?

A. I did.

Q. And how did you transcribe them?

A. Well, it is customary that——

Q. No, not what is customary. What did you do, Mr. Sims?

A. We transcribed them into a written report.

Q. Was that longhand, or——

A. Yes, sir.

Q. All right; and then what did you do with that?

A. Well, then, when the written report is in its [244] completed form in longhand, it is ready then to be typed into the finished report.

Q. All right, did you do that?

A. The typing?

Q. Or did you have it done?

A. Our secretary at the office does the typing of it.

Q. All right. Now, I show you a document here, which is typewritten, and which bears the date of

(Testimony of Louis Sims.)

February 28, 1949, and ask you to examine that document and tell me what it is, if you know.

A. That is the report that I submitted on the completion of the repairs.

Q. That is the typewritten report made from your longhand report, made from your notes taken at the time? A. That is correct.

Q. And did you check this typewritten report?

A. Yes, sir.

Q. And is that your signature at the end of it?

A. That is.

Q. And that was affixed after you checked the reports? A. That is correct.

Q. Now, then, showing you this report for the purpose of refreshing your memory, is there anything in there which would indicate the size of those beams?

A. No, except this: There is one 2 by 10 Douglas fir [245] on the bulwark, but it doesn't give the size of the cap rail.

The present cap rail was, as I specified here, to be saved and to be reinstalled and used in the final repair.

Mr. Callaway: Excuse me, Mr. Sims. What you are talking about, is it not, is this little rail that runs along here (indicating)?

The Witness: That is correct.

Q. (By Mr. Shallenberger): To the best of your recollection, that cap rail was 2 by 10?

A. If I remember correctly, yes, sir.

Q. Now, then, calling your attention, Mr. Sims,

(Testimony of Louis Sims.)

to the angle of this bulwark and the cap rail, those two timbers seem to be lying in different positions to each other; in other words, the broad surface of one appears to be parallel to the skin of the vessel, and the broad surface of the other seems to be perpendicular; is that correct?

A. That is correct.

Q. Now, then, Mr. Sims, showing you Libelants' Exhibit 5, will you identify that, sir?

A. That is a view taken of the damaged area on the starboard side of the Bear, from an angle slightly above the main guard, and it shows the point of impact where the main guard was set in and crushed.

Q. Showing you Libelants' Exhibit 6, will you identify that, sir? [246]

A. This is another view of the inner bulwarks of the starboard side, and showing the position of the main deck directly inboard of the damage to the guard, and showing the extent of the covering board being crushed and raised also there.

It shows also the stanchions. It isn't too plain, as far as the damage to the stanchion being broken along this covering board line, but you can see it here (indicating).

Also, you can see where this timber is split. In the other photograph we were looking at the forward end of it. The split comes back into it.

Q. In other words, to the extreme end and top of this picture it shows the same split bulwark—

A. Yes, sir, that is right.



(Testimony of Louis Sims.)

Q. —as is shown in Libelants' Exhibit No. 4?

A. Yes, that is correct.

The Court: It looks as if the width of this top rail decreases here. Is there some place along the edge where it becomes smaller?

The Witness: No, sir.

The Court: Is this (indicating) smaller in breadth?

The Witness: No, sir, it is the same width.

Mr. Shallenberger: Here (indicating).

The Witness: Oh, there is another place. This is bolted onto here (indicating). [247]

The Court: What?

The Witness: This piece right from here, you can see where it is notched. This short piece is bolted on.

The Court: It is over here where these are bolted together that it is 10 inches wide?

The Witness: I don't just remember the width of that.

The Court: But this piece here (indicating) is the same as this piece here (indicating).

The Witness: Yes.

The Court: Before this piece was bolted on?

The Witness: Yes, that is correct.

Q. (By Mr. Shallenberger): Showing you Libelants' Exhibit 7, Mr. Sims, can you identify that, please?

A. Well, this is another view of the starboard side of the Bear and the damage, showing the

(Testimony of Louis Sims.)

crushed main guard there, also the bruised hull planking down to the turn of the bilge.

Q. And will you indicate where it shows the bruised hull planking?

A. The bruised planking is this five or six pieces of planking from the water line down to this position where she turns under in the hold of the ship. When we removed those planks we found they had been crushed and broken, also.

Q. Now, then, showing you Libelants' Exhibit No. 8, [248] will you identify that, sir?

A. This is a photograph of the fish hold, taken from the starboard side of the fish hold, looking down into it. It shows the extent of how the deck had been wracked and pushed over by the ends of the plank being out of line. The entire after deck had been set for port and twisted and wracked, and this also shows the portion of the water that was still in the hold.

Q. By "the ends of the plank" what planks were you referring to?

A. These are the main deck planks that extend on aft.

Q. And the ends of the deck planks you are referring to, are these planks we see immediately above the net tonnage carved in the main beam?

A. Yes, that is correct.

Q. Calling your attention to the bottom portion of this picture, are those fish in there?

A. That is right. You can see the water. There is water still in the fish hold up to this point (indi-

(Testimony of Louis Sims.)

cating), and those are dead fish that are floating on top of it.

Q. Calling your attention to Libelants' Exhibit 9, what is that, Mr. Sims?

A. This is a head-on view of the stem of the Marsha Ann, and the area of damage to her.

Q. Calling your attention to the foremost part of the [249] stem, is that an iron bar?

A. That is correct. That shows a 3 by 3 piece of steel that had been fitted as the stem iron. 3 inches by 3 inches.

Q. Showing you Libelants' Exhibit No. 10, will you state what that is?

A. That is a side view taken from the forward starboard side of the Marsha Ann while she was afloat at the time the Bear was brought in and the Marsha Ann was standing by until she went into the yard, and showing a side view of the damage to the stem and the extent that the wood had been crushed.

Q. And when you say "wood had been crushed," what wood are you referring to?

A. Well, that is the wood of the stem, the main timber of the stem, and it was directly back of the bend in the stem iron.

Q. And will you describe that crushing as you observed it?

A. Well, it had evidently been set in, and at the time that it was it had crushed that section of wood, that section of the stem, to the extent that

(Testimony of Louis Sims.)

the paint had been chipped off, from the compression, of the wood.

Q. And do you know of what wood that stem is constructed immediately after the stem iron?

A. That is an ironbark stem. [250]

Q. And what is the consistency of the ironbark with regard to strength or lack of strength?

A. Well, it is a very hard, a very hard wood. It is a wood that gets its name from the hardness of it.

Q. And is it customarily used on the stems of vessels for that reason?

A. That is correct.

Q. Showing you Libelants' Exhibit No. 11, will you identify that, Mr. Sims?

A. That is another photograph taken from the starboard side, closer up, of the stem of the Marsha Ann.

Q. And what does it show?

A. It shows a close view of the damage to her stem iron and stem timber.

Q. Would you say that that is a close-up of much the same as is contained in Libelants' Exhibit 10?

A. Yes, sir.

The Court: On Libelants' Exhibit 11, where would you say the stem iron of the Marsha Ann came in contact with the guard rail of the Bear?

The Witness: What portion of it?

The Court: Yes.

The Witness: Right approximatley in there (indicating), the water line.

(Testimony of Louis Sims.)

The Court: The water line, as is marked by paint? [251]

The Witness: Yes.

The Court: That is supposed to be the water line?

The Witness: That is correct.

The Court: Where the white paint stops?

The Witness: Yes; and this is the bottom paint (indicating).

The Court: Indicating the portion above and below the line between the light and dark, where the stem hit the guard rail of the Bear?

The Witness: Yes, sir.

Q. (By Mr. Shallenberger): I believe we have already identified Libelants' Exhibit 12.

Now, then, going back, Mr. Sims, to Libelants' Exhibit No. 1, will you tell the court of what this guard rail, which shows as being crushed in this picture, is constructed, directing your attention to the material of which it is constructed and the size of that material?

A. This guard rail is a laminated section, and the outer side, this band here, is a steel band that is approximately a quarter of an inch thick, and it is 8 inches in width.

This first timber directly beneath the steel band is a hard wood facing; it was a 2 by 8, and that was ironbark.

The next two sections——

The Court: 2 inches is shown here? [252]



(Testimony of Louis Sims.)

The Witness: Yes, sir. We are looking down at the narrow width.

The Court: All right.

The Witness: The next two pieces are of Douglas fir, the first one being a 2 by 8 and the second a 2 by 10, and was then shaped down to conform to the side of the vessel, making the total there in those three pieces of 6 inches.

Directly beneath that was the sheer strake of the vessel, which was a 2 by 10. All four of those timbers were crushed, as you can see. You see the guard very plainly, and the sheer strake is directly beneath that.

Then on the inner side of the vessel, on the inside of the fish hold, there is a main clamp secured, secured directly beneath the main deck beams, and that was a 4½ by 12, and that also was shattered and broken.

Q. (By Mr. Shallenberger): Now, that clamp and deck beam that you speak of which was shattered and broken is where with relation to the crushed portion shown on this photograph?

A. Well, the main clamp is directly under the main deck, and inboard, just inboard of the frames. It is bolted into the frames, into the deck beams of the vessel, and directly beneath the main deck.

Q. All right; but I mean was the deck beam and clamp that you are speaking about in the portion where it was [253] shattered, was it opposite this crushed portion——

A. Oh, yes.

Q. —or was it before or aft of it?

(Testimony of Louis Sims.)

A. Of course the clamp runs the full length of the vessel, and the damaged area of the clamp was directly inboard of this damage we can see here (indicating).

There are also two deck beams, one about this position (indicating), slightly forward, 12 or 14 inches forward of the extreme set-in area of the main guard. The end of that deck beam was split out and shattered.

Then there was a deck beam directly inboard of the point of impact that was completely shattered and split.

Q. And did you give the size of those deck beams?

A. I don't know whether I did or not. The main clamp was  $4\frac{1}{2}$  by 10. The size of the beams was 6 by  $7\frac{1}{2}$  inches.

Q. And of what material?

A. Those were Douglas fir also.

Q. Now, then, how long were you employed on this job, Mr. Sims?

A. Well, throughout the entire course of repairs.

Q. And how long was that?

A. Well, it started on November 30th, and the vessel was redelivered to the owners on February 15, 1949.

Q. And, Mr. Sims, how often were you at the shipyard [254] in connection with this job during that period of time?

A. Well, I was there in constant attendance on the thing. I would usually make an inspection of it

(Testimony of Louis Sims.)

in the morning, and occasionally there were times when it was necessary to be back there, sometimes once, sometimes twice, again in the afternoon or in the course of the day, particularly when we were opening the damaged area to determine the full extent of the damage.

Q. Now, then, Mr. Sims, I take it that your testimony is that you were there daily during the time that the vessel was being worked on; is that correct?

A. That is correct, yes, sir.

Q. And sometimes several times a day?

A. That is right.

Q. As occasion demanded?

A. That is right.

The Court: It is 12:00 o'clock, gentlemen.

Is this a proper question to ask—we have no jury here. If it isn't—

Mr. Shallenberger: You can ask it.

The Court: Is this a couple of underwriters who paid off the damage and are now fighting among themselves to see who has to bear the burden?

Mr. Shallenberger: I am willing, if Mr. Callaway is.

Mr. Callaway: Yes. [255]

Mr. Shallenberger: The Bear's damage has been paid for by underwriters represented by Mr. Roethke, and Mr. Callaway represents the Marsha Ann company.

The Court: I assumed that. After all, I know something about the affairs of life, and I assumed you gentlemen had insurance, and in admiralty I

(Testimony of Louis Sims.)

take it, as in the other cases, the law suit proceeds under the name of the assured rather than the name of the carrier.

Mr. Shallenberger: That is correct. And I believe Mr. Roethke—possibly Your Honor doesn't recall—stated at the pretrial hearing he has all the subrogation receipts.

The Court: I do recall some reference to that. All right. Is 1:30 satisfactory?

Mr. Shallenberger: Yes.

Mr. Fall: Yes.

(Whereupon, at 12:00 o'clock noon, December 13, 1949, a recess was taken until 1:30 o'clock p.m. of the same day.) [256]













